(30)

No. 87-1622-CFX
Status: GRANTED

Title: Philip Brendale, Petitioner
v.
Confederated Tribes and Bands of Yakima Indian Nation, et al.

Docketed:
March 31, 1988

Court: United States Court of Appeals for the Ninth Circuit

Vide:
87-1697
87-1711

Counsel for petitioner: Flower,Charles C., Mirande,Michael

Counsel for respondent: Weaver,Tim, Sullivan,Jeffrey C.

Entry	Date	Note	Proceedings and Orders
1	Mar 31 1988	G	Petition for writ of certiorari filed.
3	Apr 26 1988		Order extending time to file response to petition until May 25, 1988.
4	May 25 1988	X	Brief amici curiae of Arizona, et al. filed. VIDED.
5	May 25 1988		Brief of respondent Confederated Tribes and Bands of the Yakima Indian Nation in opposition filed.
6	May 31 1988		DISTRIBUTED. June 16, 1988
7	Jun 20 1988	-	Petition GRANTED. The case is consoliated with 87-1697 and 87-1711, and a total of one hour is allotted for oral argument.
			**********
9	Jul 18 1988		Order extending time to file brief of petitioner on the merits until September 3, 1988.
10	Aug 3 1988		Joint appendix filed. VIDED.
11	Aug 23 1988		Record filed.
		*	Certified original record and proceedings, box, received. (Vide: 87-1697 & 87-1711).
12	Sep 1 1988		Brief of petitioner Stanley Wilkinson filed. VIDED.
13	Sep 2 1988		Brief of petitioner Philip Brendale filed. VIDED.
14	Sep 2 1988		Brief of petitioners County of Yakima, et al. filed. VIDED.
17	Sep 2 1988		Brief amici curiae of National Assn. of Counties, et al. filed. VIDED.
19	Sep 2 1988		Brief amici curiae of Arizona, et al. filed. VIDED.
20	Sep 2 1988		Brief amicus curiae of Parker,Arizona filed. VIDED.
21	Sep 2 1988		Brief amicus curiae of South Dakota filed. VIDED.
23	Sep 2 1988		Brief amicus curiae of QPOA and S/SPAWN filed. VIDED.
15	Sep 3 1988		Brief amici curiae of Mendocino County, et al. filed. VIDED.
16	Sep 3 1988		Brief amici curiae of Green Bay, Wisconsin, et al. filed. VIDED.
18	Sep 3 1988		Brief amici curiae of Citizens Equal Rights Alliance, et al. filed. VIDED.
22	Sep 15 1988	D	Motion of petitioner Brendale for divided argument and for additional time for oral argument filed.
25	Sep 23 1988		Order extending time to file brief of respondent on the merits until November 5, 1988.
26	Oct 11 1988		Motion of petitioner Brendale for divided argument and for additional time for oral argument DENIED.
28	Oct 22 1988	D	Motion of petitioner Philip Brendale for reconsideration of order denying motion for additional time for oral argument and for divided argument filed.
27	Oct 24 1988		SET FOR ARGUMENT. Tuesday, January 10, 1989. This case

2PP

No. 87-1622-CFX

Entry	Date	Note	Proceedings and Orders
			is consolidated with 87-1697 and 87-1711. (4th case) (1 hr.)
29	Oct 31 1988		Opposition of petitioner Wilkinson to motion of petitioner Philip Brendale for reconsideration of order denying mot filed.
31	Nov 3 1988		Brief amici curiae of Standing Rock Sioux Tribe, et al. filed. VIDED.
32	Nov 4 1988		Brief amicus curiae of Three Affiliated Tribes of Fort Berthold filed. VIDED.
33	Nov 4 1988		Brief amicus curiae of Pinoleville Indian Community filed. VIDED.
34	Nov 4 1988		Brief amicus curiae of Navajo Nation filed. VIDED.
35	Nov 4 1988		Brief amici curiae of National Congress of American Indians, et al. filed. VIDED.
36	Nov 4 1988		Brief amici curiae of Confederated Tribes of the Colville Reservation, et al. filed. VIDED.
37	Nov 4 1988		Brief amicus curiae of Colorado River Indian Tribes filed. VIDED.
38	Nov 4 1988		Brief of respondents Confederated Tribes and Bands of Yakima Indian Nation, et al filed. VIDED.
39	Nov 4 1988		Brief amici curiae of Swinomish Tribal Community, et al. filed. VIDED.
30	Nov 7 1988		Motion of petitioner Philip Brendale for reconsideration of order denying motion for additional time for oral argument and for divided argument DENIED.
40	Nov 22 1988		CIRCULATED.
41	Dec 2 1988	X	Reply brief of petitioner Stanley Wilkinson filed. VIDED.
42	Dec 5 1988	X	Reply brief of petitioner Philip Brendale filed. VIDED.
43	Dec 5 1988	X	Reply brief of petitioner County of Yakima filed. VIDED.
44	Jan 10 1989		ARGUED.

87-1622 (1)

SUPREME COURT
FILED
MAR 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO.

OCTOBER TERM 1987

PHILIP BRENDALE,

Petitioner,

vs.

CONFEDERATED BANDS
AND TRIBES OF THE
YAKIMA INDIAN
NATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES C. FLOWER and
PATRICK ANDREOTTI of
FLOWER & ANDREOTTI,
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QUESTIONS PRESENTED FOR REVIEW:

1. In 1877, Congress enacted the Dawes Act, 25 USC 331, et. seq., and land within the Yakima Indian Reservation was allotted to individual tribal members. The land remained in trust for twenty-five (25) years, then a fee simple patent was issued to the individual Indian allottee free from any encumbrance or restriction on alienability. 25 USC 348. After issuance of a fee simple patent, the allottee was subjected to the civil and criminal laws of the state in which he resided. 25 USC 349.

In 1963, the State of Washington, acting pursuant to Public Law 280 (25 USC 1360) assumed full criminal and civil jurisdiction over reservation land not held in trust for the benefit of individual Indians or the Yakima Nation.

Does the allotment and issuance of a fee simple patent for Petitioner's land within the Yakima Indian Reservation pursuant to 25 USC 331, et. seq., together with Washington's further assumption of full criminal and civil jurisdiction over all non-trust land within the Yakima Reservation divest the Yakima Nation of authority to exclusively regulate use or zone land use on Petitioner's deeded, fee-owned, non-trust land within the Yakima Indian Reservation?

2. Does Yakima County exercise of land use-zoning jurisdiction over deeded, fee-owned, non-Indian land including Petitioner-Brendale's proposed sub-division of twenty (20) acres of his deeded, fee-owned, non-trust land (all within the "closed area" of the Yakima Indian Reservation) threaten the political integrity, economic security,

general health and welfare of the Yakima Indian Nation?

3. Does subjecting Petitioner's fee simple owned land to Yakima Nation rather than Yakima County land use regulation based on its location within the "closed area" as well as the Yakima Nation's 1955 tribal resolution and the BIA's 1972 "Public Notice" creating the "closed area" violate Petitioner's constitutional due process and equal protection rights?

PARTIES TO THE ACTION:

This action (referred to in the Court of Appeals as "Whiteside I") involves Petitioner-Philip Brendale, Yakima County and the Confederated Bands and Tribes of the Yakima Indian Nation (herein "Yakima Nation").

The case with which this action was consolidated in the Court of Appeals, Confederated Bands and Tribes of the Yakima Indian Nation vs. County of Yakima, et al. (Whiteside II), involves the Yakima Nation, Yakima County, Stanley Wilkinson, Jim Gatliff and Dick Keller.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Parties to the Action	iii
Opinions Below	1
Jurisdiction	1
Statutes & Treaties Involved	2
Statement of the Case	2
Argument	22
The Ninth Circuit Opinion Conflicts with the Laws as Established by Congress and the U.S. Supreme Court	22
1. Divestiture of Yakima Nation Jurisdiction Over Deeded, Fee-Owned Land Within the Reservation	23
2. The Court of Appeals Failed to Properly Apply the Montana Rule	31
3. Violation of Due Process and Equal Protection	49
Conclusion	56

TABLE OF AUTHORITIES

Page

Cases:

Barrie vs. Kitsap County,
93 Wn.2d 843, 613 P.2d 1148
(1980) 41

Chardin vs. DeLaCruz,
671 F.2d 363 (9th Cir. 1982) . 45, 46

Department of Natural Resources
vs. Thurston County,
92 Wn.2d 657, 601 P.2d 494
(1979) 41

Hampton vs. Mow Son Wong,
426 U.S. 88, 48 L.Ed.2d 495,
96 S.CT. 1895 (1976) 51

Knight vs. Shoshone & Arrapahoe
Tribes of the Wind River Reser-
vation,
670 F.2d 900 (10th Cir. 1983). 44, 45

Lone Wolf vs. Hitchcock,
187 U.S. 553 (1903) 23

Lummi Indian Tribe vs. Hallauer,
9 I.L.R. 3025 (W.D. Wash. 1982) 46

Montana vs. United States,
450 U.S. 544, 67 L.Ed. 493,
101 S.Ct. 1245 (1981) 25, 31,
. . . . . 33, 34,
. . . . . 35, 36
. . . . . 37, 38,
. . . . . 42, 43,
. . . . . 46, 57
. 58

Queets Band of Indians vs.
State of Washington,
765 F.2d 1399 (9th Cir. 1985). 52

Segundo vs. City of Rancho Mirage,
813 F.2d 1387 (9th Cir. 1987). 27, 34,
. 35

United States vs. Anderson,
736 F.2d 1358 (9th Cir. 1984). 37, 39
. 46

United States vs. Cross,
708 F.2d 631 (11th Cir. 1983). 51

United States vs. Wheeler,
435 U.S. 313, 55 L.Ed.2d 303,
98 S.Ct. 1079 26

Washington vs. Yakima Indian
Nation,
439 U.S. 436, 58 L.Ed.2d 740,
99 S.Ct. 740 (1979) 29, 30-
. . . . . 31, 35,
. . . . . 36, 56

Statutes:

U. S. Constitution,
Fifth Amendment 51

U. S. Constitution,
Fourteenth Amendment 51

25 USC 331, et. seq.,
The Dawes Act 24, 25, 30

25 USC 348 24

25 USC 349 . . . . . 24, 28

25 USC 1302(8) 52

Public Law 280 . . . . . 28, 30, 47

RCW Chap. 37.12 . . . . . 28, 30

Regulations:

25 CFR 170.8 50

Other Authorities:

Jurisdiction to Zone Indian Reservations, 53 Wash.L.Rev. 677 (1978) . . 35, 36

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals was filed September 21, 1987, is reported in 828 F.2d 529 and is printed in the Appendix, pp. 1-39. Timely Petitions for Rehearing by Petitioner-Brendale (Whiteside I) and Yakima County (Whiteside II) were denied by "Order" filed 1/13/88 which is reproduced in the Appendix, p. 217. The Decision of the District Court was entered September 11, 1985, is reported in 617 F.Supp. 735 and reproduced in the Appendix, pp. 64-128. This "Petition for Certiorari" is due 4/12/88.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 USC 1254 and Rule 17.1 of this Court.

STATUTES AND TREATIES INVOLVED:

1. U. S. Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U. S. Constitution, Fourteenth Amendment, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 25 USC 348, Appendix p. 219.

4. 25 USC 349, Appendix p. 227.

5. 25 USC 1302(8):

No Indian tribe in exercising powers of self-government shall -

(8) deny to any person within its juris-

diction the equal protection of its laws or deprive any person of liberty or property without due process of law.

6. Public Law 280, Section 6, Act of August 15, 1953, 67 Stat. 590, 28 USC 1360, Appendix p. 230.

7. RCW 37.12.010, Appendix p. 235.

8. Treaty with the Yakimas, Appendix p. 237.

9. 25 CFR 170.8:

Free public use is required on roads eligible for construction and maintenance with federal funds under this part. When required for public safety, fire prevention or suppression, or fish and game protection, or to prevent damage to unstable roadbeds, the commissioner may restrict the use of them or may close them to public use.

STATEMENT OF THE CASE

Petitioner-Philip Brendale (herein "Brendale" or "Petitioner") is the fee owner of 160 acres of real property situate in Yakima County, Washington, and located within the exterior boundaries of the Yakima Indian Reservation. Brendale's land was on 6/15/15 allotted pursuant to 25 USC 331, et. seq., to his great-aunt, Margaret Smith, a Yakima Indian. (EX 201)

When Margaret Smith died, the allotment passed to Brendale's grandfather, Morris Charles, and his mother, Carolyn Charles, each with an undivided one-half interest as tenants-in-common. Both Morris and Carolyn Charles were enrolled members of the Yakima Nation. (TR 692) On 7/13/63, the United States issued an unrestricted, unencumbered fee simple

patent to Morris and Carolyn Charles (EX 202).

Following the deaths of Morris and Carolyn Charles, Brendale inherited the entire 160 acres in unrestricted, unencumbered fee simple. (TR 693). Although Petitioner is a direct descendant of enrolled Yakima Indians, he is not an enrolled member of the Yakima Nation.

Brendale's property is located within a portion of the Yakima Indian Reservation which was, contrary to 25 CFR 170.8 and without due process to fee land owners, "closed" to unenrolled members of the Yakima Nation by a 1955 tribal resolution, a 1972 U.S. Bureau of Indian Affairs (herein "BIA") "Public Notice" (EX 204, TR 705), and the Yakima Nation's 1972 "Amended Zoning Regulations", Section 23 (EX 6).

The Yakima Indian Reservation "closed area" is located in both Klickitat and Yakima Counties and consists of approximately 807,000 acres of the 1.3 million acre reservation. Approximately 35,000 acres of the "closed area" are owned in fee simple by non-Indians and Indians and the remainder is held in trust by the United States for individual Indians and the Yakima Nation. The "closed area" <u>in Yakima County</u> contains approximately 740,000 acres of which 25,000 acres are fee simple land.

In approximately 1900, land which the BIA and Yakima Nation has included in the "closed area" of the reservation was outside the then-established Yakima Indian Reservation boundary and was extensively homesteaded by non-Indian settlers who constructed permanent dwellings on their fee simple property.

Many of these permanent dwellings are located in "Cedar Valley" near the land now owned in fee simple by Brendale (TR 701, 703-705, EX 203).

Since the 1940's, substantially the entire forest in the reservation "closed area" has been commercially logged (TR 54). Most of the timber producing land has been logged twice; some areas are being cut for the third time. (EX 228, 229, 230, 240).

The Yakima Nation's intensive, recurring commercial logging in the "closed area" surrounding Brendale's land has been routinely conducted without any previously expressed Indian concern about religious or cultural values.

In 1972, the BIA "Public Notice" (EX 204) improperly and contrary to 25 CFR 170.8, the Dawes Act and constitutional due process, closed all roads in the

reservation forest area, except U.S. Highway 97, to all persons except enrolled members of the Yakima Tribe.

The notice provided the tribal council could first issue a "permit", then the BIA superintendent could issue "closed area entry permits" to non-enrolled members of the tribe: (1) doing business with the tribe, or (2) who on 5/02/72 owned land in the "closed area".

After Brendale inherited the property from his mother in June, 1972, he continued to use the BIA roads which were constructed and maintained with money from the U.S. General Treasury as he had in the past for access to his deeded property without applying for a permit, believing he had an absolute right of access, ingress and egress to his fee simple land.

In 1974, the United States filed suit against Brendale in United States vs. Brendale, E.D. Wash. Civil No. 74-179. On 9/30/77, the District Court granted a permanent injunction prohibiting Brendale's use of BIA roads without a permit. In 1977, Brendale was advised by the BIA superintendent anyone who purchased Brendale's property within the "closed area" would not be issued "entry permits" because they were not record owners of the land when the 1972 BIA "Public Notice" was issued and the 1972 tribal zoning ordinance enacted.

In 1978, Brendale filed suit in the U.S. District Court (Brendale vs. Olney, - C-78-145), to establish the right of his grantees, heirs, successors and assigns to have unlimited access to his "closed area" fee simple land.

On 3/03/81, a District Court "Memorandum Decision and Judgment" (EX 205) was entered finding an implied easement for access over the "closed" BIA roads, prohibiting the superintendent of the Yakima Indian Reservation from interfering with access to Brendale's property and granting Brendale, his invitees, successors and assigns in interest the absolute right to use BIA roads for access to Petitioner's land limited only if the conditions described in 25 CFR 162.8 (now 25 CFR 170.8) existed when restricted road use would be equally applied to all persons, including enrolled members of the Yakima tribe.

In 1981, Brendale advised the Yakima Nation he intended to sell his property to others unless it was purchased by the tribe and when no offer was received, advised the Yakima Nation he intended to

plat his property for sale as mountain recreation homesites. (EX 206, 207)

In late January, 1982, Brendale filed four contiguous 40-acre short plat (subdivision) applications with the Yakima County Planning Department together with the "Environmental Checklist" required by Yakima County subdivision ordinance (EX 211, TR 542-543).

Yakima County has historically exercised exclusive subdivision, land use jurisdiction over non-restricted, non-trust, fee-patent land such as Petitioner's within the exterior boundaries, including the "closed area" of the Yakima Indian Reservation. (TR 473-477, 563). The Yakima Nation did not in 1982 and at present does not have any regulations or procedure for subdividing (platting or short-platting) real estate. (TR 136, 498-499)

The Yakima County Planning Department issued a proposed "Declaration of Non-Significance" of Brendale's short plats which was mailed to and received by the Yakima Nation Tribal Council together with the "Environmental Checklist", a map showing the location of the short plat, and a request the Yakima Nation provide the Yakima County Planning Department with its comments on the Environmental Checklist, proposed "Declaration of Non-Significance" and short plat.

Yakima County received no comments or suggestions from the Yakima Nation about Appellant's four short plats. (TR 542-543, EX 211, 212) The Environmental Checklist sent to the Yakima Tribal Council clearly indicated Appellant's eventual, intended use of the short platted land was to develop recreational homesites.

In March, 1982, Brendale advised the Yakima Nation of his completed short plats and intent to proceed with subdivision sales for development since the tribe did not appear interested in purchasing Brendale's property. Brendale then received a BIA offer to purchase his land for less than twenty percent (20%) of its fair market value. (EX 208, 209) Brendale submitted a counter-offer to the BIA and then received a letter from the Yakima Nation raising for the first time land use limitations contained in tribal zoning regulations. (EX 210)

In April, 1983, Brendale filed an application with Yakima County to subdivide twenty (20) acres of his property into ten (10) two-acre lots. Brendale proposed use of the lots for recreational cabins and travel trailer sites. (EX 122)

The filing of Brendale's subdivision application with Yakima County and Yakima County's assumption of jurisdiction to consider the application triggered this litigation.

The Yakima County Planning Department determined Brendale's proposed subdivision would not have a significant adverse effect on the forest environment in which the property was located and issued a "Declaration of Non-Significance" (EX 123).

The Yakima Nation appealed the Planning Department's "Declaration of Non-Significance" to the Yakima County Commissioners. After considering the Yakima Nation's contention Yakima County did not have jurisdiction to subdivide Appellant's fee land, the Commissioners (who are also defendants in this litiga-

tion) received testimony on the merits of the need for an Environmental Impact Statement.

On 8/16/83, after four (4) days of hearings, the Commissioners entered "Findings of Fact, Conclusions of Law and Order of Yakima County Commissioners" (EX 7) overruling the Planning Department's "Declaration of Non-Significance" and requiring the preparation of an Environmental Impact Statement for Brendale's plat application.

The Yakima Nation filed its Complaint in the District Court. After a hearing, the District Court granted a temporary restraining order on 9/22/83 (CR 12), and orally granted a preliminary injunction on 10/17/83. The District Court's "Memorandum and Order Granting Preliminary Injunction" was entered 11/16/83. (CR 42) The case was set for

an expedited trial on the merits and tried between 1/30/84 and 2/02/84.

"Environmental assessments" (herein "EA") by the BIA were conducted for three (3) large Yakima tribal commercial timber sales close to Brendale's land in the early 1980's. (EX 232, 233 and 234)

The EA's concluded intensive logging in the area would have no significant effect on the environment even though the logging would involve the construction of new roads, use of heavy equipment, logging operations and substantial slash burning in the closed area. The EA's disclosed no sites of specific religious or cultural significance to the Yakima Nation or its members which would be impacted by the tribe's intensive logging operations. One of the EA's disclosed the existence of the partially developed "Olney Creek Campground" in the sale area

and acknowledged the asphalt paved Signal Peak Road (which provides access to Petitioner's land) was already receiving heavy use. (EX 234, p. 2). Another EA acknowledged use of roads to be constructed within the sale area after the timber was logged might have a negative effect on some use of the area by elk herds. The EA did not, however, consider the effect on elk herds significant. (EX 233, p. 2). Although there was testimony at trial road use associated with Brendale's development might have some effect on deer and elk herds in the area, no evidence was presented the effect would be any greater than current substantial traffic from logging, enrolled tribal members and permittees presently using the same roads which provide access to Brendale's property. (TR 407, 411-412) The Yakima Nation's witnesses

testified about prospective harrassment of game animals by Brendale's purchasers and their pets. Tribal members currently bring to the "closed area" dogs which are allowed to run free (TR 737). Members also hunt both deer and elk all year (TR 792). The adverse effect of pets owned by enrolled members and their guests currently admitted throughout the "closed area" and the year-around tribal deer and elk hunting is obviously greater than would result from people and pets on Brendale's proposed development which would be confined to their land and would have no hunting privileges.

The Yakima Nation's primary concern about Petitioner's proposed development is a prospective increase of fire danger to the timber producing area. It was acknowledged, however, fires built by users of Brendale's development would be

much less a threat to the surrounding forest than open fires in campgrounds or fires by Yakima Nation members camping outside established campgrounds. (Williams deposition, p. 53).

Evidence was also submitted about potential introduction of noxious weeds by users of Brendale's proposed development which might adversely affect timber, traditional herbs and plants (TR 70). The substantial introduction of noxious weeds already exists, however, because the Yakima Nation and BIA permit summer and fall grazing within the "closed area" of 7,000-8,000 head of cattle (TR 259) which winter in areas containing noxious weeds (TR 195-196). Hay, which was described as a major source of noxious weeds, is currently brought into the "closed area" by enrolled Indians and other permitted users (TR 736). The

danger of noxious weeds from activities currently permitted by the Yakima Nation and BIA indicates the potential noxious weed danger posed by users of Brendale's proposed development is insignificant.

Before Brendale's plat application and this litigation, the State of Washington and Yakima County have also exercised exclusive jurisdiction of fee land within the "closed area" through the Washington State Forest Practices Act (RCW Chap. 76.08), issuing permits for timber harvesting, chemical application, removal of forest debris, replanting and removal of land from forest management (TR 605-607).

The State also imposes a "forest patrol tax" on fee land within the "closed area" which is collected by Yakima County for fire suppression on fee

land within the "closed area". (TR 611, EX 225).

Both the BIA and Appellee-Yakima Nation have acknowledged they have no jurisdiction over, and have not attempted to control, timber management and other logging activities on fee land within the "closed area" of the Yakima Reservation (TR 184; Williams deposition, p. 59-71).

Washington State and Yakima County real property and other taxes are assessed against the fee land in the "closed area", paid by Brendale and other fee owners and collected by Yakima County (EX 225).

ARGUMENT

The Ninth Circuit Opinion Conflicts With the Law as Established by Congress and the U.S. Supreme Ccurt.

1. Divestiture of Yakima Nation jurisdiction over deeded, fee-owned land within the Reservation.

It is undisputed Congress has the power to unilaterally limit or abrogate treaties with Indian tribes. Lone Wolf vs. Hitchcock, 187 U.S. 553 (1903).

Congress has, in the exercise of its power over Indian tribes and treaties, terminated the exclusive nature of the Yakima Reservation and authorized the State of Washington to assume civil and criminal jurisdiction over fee simple, non-trust land within the reservation.

With its assumption of jurisdiction over all non-trust, non-restricted land in the Yakima Indian Reservation in 1963 pursuant to RCW Chap. 37.12, the State of Washington's jurisdiction over non-trust land within the reservation became complete and exclusive.

In 1877, Congress enacted the Dawes Act, 25 USC 331, et. seq., and land within the Yakima Indian Reservation was allotted to individual tribal members. The land remained in trust for twenty-five (25) years, then a fee simple patent was issued to the individual Indian allottee without any encumbrance or restriction on alienability (25 USC 348). After a fee simple patent was issued to an Indian, the Indian was subjected to the civil and criminal laws of the state in which he resided (25 USC 349).

The land which is the subject of this case was initially allotted to Petitioner's great-aunt, an enrolled Yakima Indian, and the fee simple patent in the land was issued to Petitioner's grandfather and mother, all pursuant to the Dawes Act.

In Montana vs. United States, 450 U.S. 544, 67 L.Ed.2d 493, 101 S.Ct. 1245 (1981), this Court specifically recognized Congress's intent to eliminate tribal jurisdiction over land patented pursuant to the Dawes Act, stating at Note 9, 67 L.Ed.2d 507:

* * *

> "There is simply no suggestion in the legislative history that Congress intended that the non-Indians who have settled upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction . . . it defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy is the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined the purpose of peaceful assimilation could be advanced if freeholders could be excluded from fishing or hunting

on their acquired property." (Emphasis Added)

* * *

Although Indian tribes possess "inherent sovereignty", their sovereignty has been substantially restricted and limited by treaty, statute and the tribe's dependent status.

In United States vs. Wheeler, 435 U.S. 313, 326, 55 L.Ed.2d 303, 98 S.Ct. 1079, this Court discussed and distinguished the inherent powers which tribes have retained and those which have been divested, stating:

* * *

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving relations between an Indian tribe and non-members of the tribe . . .
>
> "These limitations rest on the fact that the dependent status of the Indian tribe within our territorial

> jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. The powers of self-government, including the power to prescribe and enforce internal criminal laws are of a different type. They involve only the relations of members of the tribe. Thus they are not such powers as would necessarily be lost by virtue of the tribe's dependent status." (Emphasis Added)

* * *

The Ninth Circuit has recognized land within an Indian reservation for which a fee simple patent has been issued is subject to state and municipal regulation.

In Segundo vs. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987), the District Court held city rent control regulations could be applied to Indian land because the trust patents issued for the land would expire in 1986 and the

land would become subject to all California laws pursuant to 25 USC 349.

The Ninth Circuit recognized the effect of 25 USC 349 but since the Secretary of Interior had extended the trust status to 1989, the land was still in trust and was not, therefore, subject to city regulatory ordinances.

Although RCW Chap. 37.12 enacted pursuant to Public Law 280 did not expressly grant the State of Washington specific zoning jurisdiction over fee-patent land within the Yakima Reservation, land use jurisdiction had been previously acquired when fee patents were issued pursuant to 25 USC 349; enactment of RCW Chap. 37.12 formalized the State's zoning jurisdiction of reservation fee patent land as complete and exclusive.

The State's complete jurisdiction of fee simple, non-Indian owned

land within the Yakima Reservation for all purposes including zoning was explicitly recognized by this Court in Washington vs. Yakima Indian Nation, 439 U.S. 463, 498, 499, 58 L.Ed.2d 303, 99 S.Ct. 740 (1979):

* * *

> "State jurisdiction is complete as to all non-Indians on reservations and is also complete as to Indians on non-trust lands.
> . . .

* * *

> "The state has accepted the jurisdictional offer in Public Law 280 in a way that leaves substantial play for tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within the reservation, has plainly taken action within the terms of the offer made by Congress to the states in 1953." (Emphasis Added)

* * *

The Ninth Circuit clearly failed to recognize or even consider Washington State's assumption of civil, zoning jurisdiction pursuant to Public Law 280 and RCW Chap. 37.12 as being the final step in the divestiture of all tribal jurisdiction over deeded, fee-patent, non-trust land within the Yakima Reservation consistent with the clearly expressed Congressional intent of the Dawes Act and Public Law 280.

The failure of the Ninth Circuit to accept the divestiture of tribal zoning jurisdiction over non-trust, non-restricted fee simple land within the Yakima Reservation and resulting exclusive jurisdiction of Washington State and its political subdivision, is contrary to and a fundamental departure from the express, unambiguous holdings of this Court in Washington vs. Yakima

Indian Nation, supra, and Montana vs. U.S., supra.

2. The Court of Appeals Failed to Properly Apply the Montana Rule:

The Court of Appeals held the Yakima Nation had authority to regulate non-Indian land use of deeded, non-trust land within the Yakima Reservation. The Ninth Circuit holding is a misapplication of the test enunciated by this Court in Montana vs. United States, supra.

In Montana, this Court recognized an Indian tribe's dependent status eliminated many attributes of tribal sovereignty, stating at 67 L.Ed.2d 509-510:

* * *

> "This Court most recently reviewed the principals of inherent sovereignty in United States v. Wheeler, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079. In that case,

holding that Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory', Id. at 323, 55 L.Ed.2d 303, 98 S.Ct. 1079, the court upheld the power of the tribe to punish tribal members who violate tribal criminal laws. But the court was careful to note that, through their original incorporation into the United States as well as through the specific treaties and statutes, Indian tribes have lost many of the attributes of sovereignty. Id., at 326, 55 L.Ed.2d 303, 98 S.Ct. 1079. The court distinguished between those inherent powers retained by the tribes and those divested:

> "'The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe. These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal

> laws are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.' Ibid. (Emphasis added by the Montana Court).

"Thus, in addition to the power to punish tribal offenders, the Indian tribes retained their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. Id. at 322, n. 18, 55 L.Ed.2d 303, 98 S.Ct. 1079. But the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. (Citations omitted)." (Emphasis Added)

The Montana Court noted two (2) factual settings in which an Indian tribe may retain the power to exercise limited civil jurisdiction over non-Indians on fee land within the reservation. The first, which is not applicable in this case, exists if non-Indians enter con-

sensual relations with the tribe or its members. The second exists if conduct of non-Indians on fee-land threatens or has some direct effect on the political integrity, economic security, health or welfare of the tribe. Montana vs. United States, 450 U.S. 565-566.

The Court of Appeals in both this case and Whiteside II improperly found denial of tribal zoning jurisdiction of non-Indian, "closed area" fee land would threaten or directly affect the tribe's health or welfare.

The Ninth Circuit erroneously relied in part on Segundo vs. City of Rancho Mirage, 813 F.2d 1387, 1393 (9th Cir. 1987), stating: "land use regulation is within the tribe's legitimate sovereign authority over its lands".

Segundo involved, however, only trust land, not non-Indian, fee simple land.

Although an Indian tribe's retained sovereign authority may include zoning jurisdiction of trust land, Montana clearly established a tribe has no jurisdiction over activities on non-Indian fee land unless one of the Montana exceptions is satisfied.

Ninth Circuit application of Segundo to this case is plain error, clearly contrary to and in direct conflict with the U.S. Supreme Court's holding in Montana.

The Court of Appeals also erroneously relied on Jurisdiction to Zone Indian Reservations, 53 Wash.L.Rev. 677 (1978), a Comment written before this Court's decisions in Washington vs. Yakima Nation, supra, and Montana vs. United States, supra.

The Comment theme is: checkerboard jurisdiction resulting from denial of a tribe's jurisdiction to zone fee land within the reservation is undesirable and unwise.

In Washington vs. Yakima Indian Nation, supra, this Court recognized checkerboard jurisdiction as the only method of harmonizing a tribe's limited sovereign authority with the rights and interests of non-Indians and states. Washington vs. Yakima Indian Nation, supra, 439 U.S. 499, 502.

The appropriate Montana test to determine if Congress intended the tribe to retain sovereignty to zone fee land within the reservation, is whether or not Yakima County regulation of reservation fee land would in fact threaten or directly affect the Yakima Nation's

political integrity, economic security, health or welfare.

Contrary to the Ninth Circuit's "Opinion", application of the second Montana exception is not resolved by considering whether or not "good land use planning practices" make it desirable for the tribe to have zoning jurisdiction over all land within the reservation.

The Ninth Circuit has previously acknowledged and correctly applied the Montana test in United States vs. Anderson, 736 F.2d 1358 (9th Cir. 1984).

In Anderson, the issue was: Did Washington State or the Spokane Tribe have the authority to regulate water rights on fee land within the reservation? The Anderson Court concluded the tribe had no water right jurisdiction on fee land because the

Montana exceptions were inapplicable, stating at 736 F.2d 1365:

* * *

> "We find no conduct which so threatens or has such a 'direct effect on the political integrity, the economic security or the health or welfare of the tribe' as to confer tribal jurisdiction". (Emphasis Added)

* * *

Before the Yakima Nation can regulate or zone the use of Petitioner's fee land, there must be facts in the record to sustain a finding Petitioner's development and land use permitted by and subject to Washington State statute and Yakima County regulations, are a substantial threat or have a substantial direct, adverse effect on the tribe's political integrity, economic security, health or welfare. Minimal intrusion on tribal interests or speculative impacts are not

sufficient. United States vs. Anderson, supra, at 1336.

Yakima County land use regulations include the Washington State Environmental Policy Act, the county subdivision ordinance, zoning code and shoreline (wetland) master plan. It is clear reservation fee land development and use subject to county regulation and state statute are not a significant threat and will not have a significant direct or adverse effect on the Yakima Nation's political integrity, economic security, health or welfare.

The Yakima Nation initially appealed the Yakima County Planning Department's "Declaration of [Environmental] Non-Significance" of Petitioner's plat application to the Yakima County Board of Commissioners. A hearing by the Commissioners identified fourteen (14)

potential environmental questions. The County Commissioners required Petitioner prepare an "Environmental Impact Statement" before County consideration of Petitioner's plat application.

The County Commissioners' findings of "potential" environmental impact were erroneously adopted by the District Court as evidence Petitioner's proposed development threatened or adversely affected tribal interests. (9/11/85 Memorandum Opinion, Whiteside I, Appendix pp. 83-93; 2/04/84 Oral Opinion, Whiteside I, Appendix p. 52.)

The Commissioners' findings after the Yakima Nation's appeal cannot, however, be the basis for finding the Yakima Nation's interests are threatened or affected by development conducted in compliance with county and state land use regulations.

The Commissioners' hearing and findings establish Petitioner's compliance with county regulations and procedures will prevent adverse impact or effect on tribal interests by development on fee land within the reservation. Before any development, Petitioner must not only comply with the county zoning, subdivision and wetland codes but also state statutes and regulations requiring preservation of environmental, social and economic values. Department of Natural Resources vs. Thurston County, 92 Wn.2d 657, 663-665, 601 P.2d 494 (1979); Barrie vs. Kitsap County, 93 Wn.2d 843, 858-860, 613 P.2d 1148 (1980).

The Court of Appeals also erroneously failed to consider the extensive past history of county and state regulation of fee land in the reservation.

If the tribe and other parties previously acquiesced in and accepted non-Indian regulation of the fee land within the reservation, there is no threat or direct effect on tribal self-government or other interests. Montana vs. United States, supra, 450 U.S. 554, Fn. 13.

Yakima County and Washington State have exercised exclusive jurisdiction over land use on fee-land within the reservation closed area, including Petitioner's property before this case and Whiteside II were filed. In 1982 Yakima County accepted, processed and approved four (4) contiguous short plats of Petitioner's property.

The Yakima Nation did not object to Petitioner's short plat or county jurisdiction over Petitioner's proposal although Yakima Nation had notice of

Petitioner's application and the County's "Declaration of Non-Significance".

In addition, timber production, the primary use on fee land within the reservation closed area, has been exclusively regulated and controlled by the Washington State Forest Practice Act and administrative regulations. State permits for timber cutting, chemical applications, removal of forest debris and forest practices which involve water affecting fish have been routinely required and issued by the state. Fee land within the timbered portion of the closed area is also subject to a "forest patrol tax" collected by Yakima County for fire suppression and control.

In this case, as in Montana, Washington State and Yakima County's previous, exclusive regulation of reser-

vation closed area fee simple land and the tribe's long acquiescence in and acceptance of state and county regulation clearly establishes Yakima County's exercise of land use jurisdiction on reservation fee land has not in the past and will not in the future threaten or directly affect the Yakima Nation's political integrity, economic security, health or welfare.

Other cases in which an Indian tribe has been found to have authority to impose restrictions on fee land within a reservation do not provide any support for the Ninth Circuit's conclusion the Yakima Nation should have zoning jurisdiction of fee land in this case.

In Knight vs. Shoshone & Arrapahoe Tribes of the Wind River Reservation, 670 F.2d 900 (10th Cir. 1983), neither the state nor county involved asserted or

exercised land use jurisdiction within the exterior boundaries of the reservation. The tribe's zoning ordinance was the only land use regulation which controlled development on the reservation. The Court found unregulated development would directly affect tribal and allotted land and permitted the tribe's enforcement of its zoning ordinance on reservation fee land.

In Chardin vs. De La Cruz, 671 F.2d 363 (9th Cir. 1982), the Court not only found the non-Indian landowner was engaged in "consensual" relations with the tribe through commercial dealing, but also found the non-Indian landowner's violation of the tribal building and health regulations substantially and directly affected the tribe's health or welfare. Again, as in Knight, supra, there is no indication there existed

state or county regulation of the Chardin landowner's business.

In Lummi Indian Tribe vs. Hallauer, 9 I.L.R. 3025 (W.D. Wash. 1982), the Court specifically held the lack of adequate reservation sewer system regulation had the potential for significantly affecting the economy, health and welfare of the tribe and authorized the tribe to require non-Indians to hook up to the tribe's sewer system. There is absolutely no evidence in Lummi the state or county had exercised land use jurisdiction of reservation fee land.

In this case, as in Montana vs. United States, supra, and United States vs. Anderson, supra, Yakima County's regulation of fee land within the exterior boundaries of the Yakima Reservation and Petitioner's proposed develop-

ment of his fee simple property in compliance with and subject to county and state regulations pose no direct threat to or effect on the Yakima Nation's political integrity, economic security, health or welfare sufficient to confer tribal zoning jurisdiction on non-Indian fee simple land.

Yakima County's assertion and exercise of land use jurisdiction over Petitioner's fee land within the Yakima reservation is, like Washington State's 1963 assumption of jurisdiction over reservation fee land pursuant to PL 280, a responsible accomodation of both Indian and non-Indian rights within the reservation consistent with this Court's prior decisions, providing state and county protection and services to non-Indian citizens living within the reservation who have no voice in tribal government

but at the same time deferring to and not interfering with tribal self-government on trust or restricted land.

The Trial Court in Whiteside II correctly found "checkerboard" zoning and appropriate multi-jurisdictional zoning are required by today's society, whether it involves counties, cities, towns or Indian tribes. (6/08/84 Oral Opinion, Whiteside II, Appendix p. 154.)

The imposition of tribal land use-zoning regulation on reservation fee land pursuant to the Court of Appeals' "Opinion" is not necessary to serve or protect legitimate tribal interests which are not already served and protected by state and county regulation.

On the other hand, the Yakima Nation "closed area" zoning regulations approved by the Ninth Circuit destroy existing comprehensive county-state land use

programs which are responsive to and accomodate both tribal and non-Indian interests. Exclusive tribal zoning also subjects non-Indian citizens and land-owners on the reservation to regulation by a tribal government in which they are prohibited from participation and to adverse decisions from which there is no speedy, meaningful judicial review.

3. Violation of Due Process and Equal Protection:

The District Court's decision in this case (Whiteside I) and its later decision in the companion, consolidated Whiteside II case erroneously create two (2) classes of fee simple land owners within the exterior boundaries of the Yakima Reservation based on location of land without a reasonable basis for the classification.

The Court of Appeals also discussed and decided the issue of exclusive Yakima Nation zoning jurisdiction based on an unconstitutional classification of land in the reservation "open" and "closed" areas holding the Yakima Nation has exclusive jurisdiction of the "closed" area and remanding the issue of Yakima Nation's exclusive zoning jurisdiction in the "open" area to the District Court for additional findings of fact.

Creation of the "closed area" by 1955 tribal resolution, 1972 BIA "Public Notice" contrary to 25 CFR 170.8 and perpetuation of it by Yakima Nation's 1972 zoning ordinance are also an unconstitutional, unlawful deprivation of Petitioner and other fee owners' due process and equal protection rights.

The District Court and Ninth Circuit Court of Appeals have erroneously adopted

in Whiteside I and II the Yakima Nation and BIA's previous unlawful acts creating unconstitutional classification and have erroneously affirmed their violation of Petitioner's due process and equal protection rights.

The Fifth Amendment of the U.S. Constitution imposes the requirement of providing equal justice and law on the federal government; it subjects federal actions to the same requirements imposed on the states by the Fourteenth Amendment equal protection clause. Hampton vs. Mow Son Wong, 426 U.S. 88, 48 L.Ed.2d 495, 96 S.Ct. 1895, 1903-1904 (1976).

The Fifth Amendment equal protection requirements also apply to federal court acts and decisions. See: United States vs. Cross, 708 F.2d 631 (11th Cir. 1983). Tribal acts and decisions are also subject to the same standards pursuant to

the Indian Civil Rights Act, 25 USC 1302(8).

To satisfy equal protection requirements, different classifications of similarly situated persons and land must bear a rational relationship to a legitimate government objective. See: Queets Band of Indians vs. State of Washington, 765 F.2d 1399 (9th Cir. 1985).

The District Court in this case (Whiteside I) determined "closed area" fee owned land was subject to the Yakima Nation's exclusive zoning jurisdiction. The District Court later held in Whiteside II "open area" fee land within the exterior boundaries of the reservation but outside the "closed area" was subject to Washington State and Yakima County's exclusive zoning jurisdiction.

In both cases, the apparent governmental objective was the preservation of the Yakima Nation's political integrity, economic security, health and welfare.

No evidence was introduced in this case to show how the boundary of the "closed area" was established or what relation, if any, the boundary of the "closed area" had to preservation of the Yakima Nation's political integrity, economic security, health or welfare.

The classification of fee owned land based on its geographic location inside or outside the "closed area" of the reservation is not, however, rationally related to the stated objective.

The District Court subjected Petitioner's property and other reservation "closed area" fee land to the Yakima

Nation's zoning jurisdiction "to preserve the area's religious and cultural significance".

The Yakima Nation's archeologist testified about 62 sites of religious or cultural significance he had located within the reservation. Most of the sites are along the Yakima River (TR 781-782) outside the reservation "closed area". The largest concentration of sites in the "closed area" is along the extreme eastern boundary (TR 778-779), a very substantial distance from Petitioner's land.

The result of the conflicting decisions in Whiteside I and II is to judicially require different land use regulations for similarly situated individuals and land based on the location of their land within the arbitrarily created "open" or "closed" areas of the

reservation, a classification unrelated to preservation of the Yakima Nation's political integrity, economic security, health and welfare.

Non-Indian fee-owned land in the "open area" along the Yakima River where the largest number of religious and culturally significant sites are located is subject to Washington State and Yakima County land use jurisdiction.

Brendale's land, located in the "closed area" far from any significant concentration or presence of religious or cultural sites and which has been logged over at least twice (the last time after a BIA "environmental assessment" found no religious or culturally significant sites in the area) is, however, subject to the Yakima Nation's exclusive land use jurisdiction.

Creation of the "closed area", classification and subjection of fee-owned land to land use jurisdiction based on its geographic location within the Yakima Indian Reservation do not bear any rational relationship to preservation of Yakima Nation's political integrity, economic security, health or welfare and violate Brendale's constitutional rights.

CONCLUSION

The Court of Appeals' decision in this case disregards Congress's express declaration land allotted and patented pursuant to the Dawes Act would be subject to state law and regulation as well as this Court's prior unambiguous holding in Washington vs. Yakima Indian Nation, supra, of Washington State's complete civil jurisdiction of non-trust,

fee simple land within the Yakima Reservation.

The Court of Appeals has misconstrued and misapplied this Court's decision in Montana vs. United States, supra, in a manner which will disrupt a well-established county and state land use program although the county's exercise of land use jurisdiction does not result in any significant threat or have a direct effect on the Yakima Nation's political integrity, economic security, health or welfare.

Yakima Nation zoning regulation of fee-owned land within the Yakima Reservation based on whether or not the land is within the reservation "closed" or "open" areas and Yakima Nation-BIA creation and perpetuation of the "closed" area have no rational relation to the protection of the Yakima Nation's limited

sovereignty and violate due process and equal protection provisions of the U.S. Constitution.

Potential application of this case to other Indian reservations containing fee land and non-Indian landowners within the reservation requires this Court's review of the Court of Appeals' 9/21/87 "Opinion" and reaffirmation of Montana vs. United States, supra.

DATED: March 24, 1988.

Respectfully submitted,

FLOWER & ANDREOTTI,
Attorneys for Petitioner.

_____
CHARLES C. FLOWER

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PATRICK ANDREOTTI

87-1622

Supreme Court, U.S.
FILED
MAR 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO.

OCTOBER TERM 1987

PHILIP BRENDALE,

Petitioner,

vs.

CONFEDERATED BANDS
AND TRIBES OF THE
YAKIMA INDIAN
NATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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263

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TABLE OF CONTENTS

	Page
9/21/87 Ninth Circuit Opinion	1
2/02/84 Trial Court Opinion (Whiteside I)	40
9/10/85 Trial Court Memorandum Opinion (Whiteside I)	64
9/11/85 Trial Court Judgment (Whiteside I)	129
11/05/85 Order Denying Brendale's Amended Motion for Reconsideration . .	131
11/19/85 Order Denying Defendant-Brendale's Motion Under Rule 60B, FRCP	133
6/08/84 Findings of Fact & Conclusions of Law (Oral Opinion-Whiteside II)	136
9/10/85 Memorandum Opinion (Whiteside II)	166
9/11/85 Judgment (Whiteside II)	215
1/13/88 Ninth Circuit Order Supplementing Record and Denying Petition for Rehearing	217
25 USC 348	219

	Page
25 USC 349	227
Public Law 28, Sections 3-7, 67 Stat. 590	230
RCW 37.12.010	235
Treaty with the Yakima's, 1855	237

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, Plaintiffs-Appellees, vs. JIM WHITESIDE, et al., Defendants, and PHILIP BRENDALE, Defendant-Appellant.	)	NOS. 85-4316; 85-4433; 85-4383 D.C. NOS. C83-724 JLQ C83-604 JLQ
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, Plaintiffs-Appellants, vs. COUNTY OF YAKIMA, et al., Defendants-Appellees.	)	OPINION

Argued and Submitted
November 6, 1986 - Seattle, Washington

Filed September 21, 1987

Before: Otto R. Skopil, Jr.,
Betty B. Fletcher and Cecil F. Poole,
Circuit Judges

Opinion by Judge Fletcher

Appeal from the United States District Court for the Eastern District of Washington
Justin L. Quackenbush,
District Judge, Presiding

SUMMARY

Indians/Land Use and Zoning

Appeal from judgments. Whiteside I affirmed; Whiteside II reversed and remanded.

Whiteside I and Whiteside II were consolidated for this case. Whiteside I involves appellee Yakima County land which falls within the Yakima Indian Reservation's closed area. This area is restricted to members of appellee Yakima Nation in order to protect its resources. The Yakima Nation's zoning ordinance

extends to the closed area. Within the reservation, the County regulates fee land but not trust land. The County zoning of the closed area conflicted with the Yakima Nation's interest. Appellant Brendale's fee property falls within the closed area. The County granted Brendale's application to divide and build on the land. The Yakima Nation appealed on the ground that the County did not have authority to regulate the Brendale land and that the development would significantly affect the environment. The district court found that Yakima Nation's interests in zoning fee land owned by non-members within the closed area of the reservation were infringed by the application of County's zoning ordinances and therefore precluded county zoning. Appellant Brendale appeals.

Whiteside II involves about half of the land in the open area which is held in fee. Under the Yakima Nation's zoning ordinance, the Wilkinson property is zoned principally for agricultural purposes. The County, however, under its zoning system, designated the Wilkinson property as "general rural." This conflicted with the Yakima Nation's zoned use. The Wilkinson property is nearly adjacent to the reservation's northern boundary. The County permitted Wilkinson to subdivide and build upon his land contingent upon Wilkinson agreeing to modify his proposal. Yakima Nation appealed, the Commissioners affirmed and Yakima Nation sued. The district court held that Yakima Nation did not have the authority to zone non-Indian fee land in the open area, and permitted application

of the County's ordinances. Yakima Nation appeals.

[1] Public Law 280, which grants state courts jurisdiction over civil litigation involving reservation Indians, does not affect Yakima Nation's authority to zone. [2] States may impose laws on non-members engaged in activities on Indian reservations unless a given law is preempted by federal law or unless it unlawfully infringes on the right of reservation Indians to self-government. [3] Preemption is construed generously. [4] Tribal authority extends to regulation over the activities of non-Indians on reservation lands. [5] Because the Yakima Nation has authority under the more stringent Montana test, this court does not consider the Colville analysis. [6] Land use regulation is within the Tribe's legitimate sovereign authority.

[7] If this court were to deny Yakima Nation the right to regulate fee land owned by non-Indians, it would destroy their capacity to engage in comprehensive planning, fundamental to a zoning scheme.

[8] In Whiteside II, Yakima Nation has alleged a number of justifications for regulating the open area and in particular the Wilkinson property. The County, by contrast, has not suggested any off-reservation interest in imposing its zoning code on fee land with the reservation. [9] This court remands to the district court the issue of whether the interests of Yakima Nation, as shaped by federal policy, outweigh the interests of the County in imposing zoning ordinances on fee land owned by non-Indians in the open area.

COUNSEL

James B. Hovis, Yakima, Washington, for the plaintiff-appellant.

Charles C. Flower, Jeffrey C. Sullivan, David A. Thompson and Patrick Andreotti, Yakima, Washington, for the defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

The Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Nation) brought these two cases in federal court seeking a declaratory judgment and an injunction barring the defendants from making or permitting any land use within the Yakima Indian Reservation that is contrary to the Amended Zoning Regulations of the Yakima Nation. In Whiteside I, the district court found that Yakima Natien's interests in zoning fee land owned by non-members within the closed

area of the reservation were infringed by the application of Yakima County's (the County) zoning ordinances and therefore precluded county zoning. By contrast, in Whiteside II, the district court found that Yakima Nation did not have the authority to zone non-Indian fee land in the "open" area, and permitted application of the County's ordinances.

Defendant Philip Brendale, record owner of fee land in the closed area at issue in Whiteside I, appeals on the ground that Yakima Nation has no interest in regulating fee land owned by non-members. We affirm the judgment in Whiteside I. Yakima Nation appeals the judgment in Whiteside II and argues that the tribe has the authority to zone non-Indian fee land in the open area, and further that the federal and tribal interests outweigh the County's interest

in regulating the land. We agree that Yakima Nation possesses the requisite authority to zone, and remand to the district court to balance the federal, tribal and County's interests.

FACTS

I. Whiteside I

The Yakima Indian Reservation is composed of 1.3 million acres of land. Of this amount, about 807,000 acres, including 740,000 acres in Yakima County, fall within the reservation's closed area. Only 25,000 acres of the closed area within Yakima County are held in fee. The closed area is restricted to members of Yakima Nation and permittees in order to protect and enhance its natural resources, natural foods, medicines, game wildlife, and environ-

ment. Much of the closed area is forested with timber, a mainstay of Yakima Nation's economic operations. The closed area is relatively undeveloped. There are no permanent residents in the part of the closed area located in Yakima County.

In 1970, Yakima Nation adopted its first zoning ordinance. The ordinance was made more comprehensive in 1972. The tribal code provides for five categories of districts: agricultural, residential, commercial, industrial and restricted. It also establishes requirements for building permits, authorizes the creation of Planned Development Districts, and provides for special use permits. Under the tribal code, only the following uses are permitted in the closed area:

1. Harvesting wild crops;

2. Grazing, timber production or open field crops;

3. Hunting or fishing by Tribal members;

4. Camping in temporary structures;

5. Tribal camps for the education and recreation of tribal members;

6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of tribal resources;

7. No building or other permanent structure or any appurtenances thereto other than those allowed in Sections 1-6 above shall be allowed in this district;

8. Any structure which is authorized in Sections 1-6 above shall be set back 200 feet from any waterway.

Yakima County has regulated land use since 1946, but passed its first comprehensive zoning ordinance in 1965. Within the reservation, the County regulates fee land but not trust land. The County zoned the closed area as "forest watershed", which permits such structures as single family dwellings, commercial

campgrounds, overnight lodging facilities with less than sixteen units, restaurants, bars, and general stores. The forest-watershed district is designed to conserve land and water while accommodating pressures for residential, recreational and commercial uses. The County has other land-use regulations applicable to fee land. These include the 1974 subdivision ordinance, which imposes standards for streets, water, sewage, drainage, parks and recreation areas, and school sites, the Yakima County Shoreline Master Program and a federal flood insurance program.

The Brendale property consists of 160 acres of fee land within the forested portion of the closed area. The nearest county road is over twenty miles away. In January, 1982, Brendale filed four contiguous short plat applications with

the Yakima County Planning Department, which issued a Declaration of Non-Significance and later approved the applications. In April, 1983, he submitted a long plat application to divide one of his new twenty-acre parcels into ten two-acre lots. He intended the lots to be sold as summer cabin or trailer sites. The County Planning Department issued a Declaration of Non-Significance, which Yakima Nation appealed on the grounds that the County did not have authority to regulate the Brendale land and that the development would significantly affect the environment. The Commissioners found that the County had jurisdiction, but that an Environmental Impact Statement (EIS) should be prepared. Yakima Nation brought this suit as the County began work on the EIS.

II. Whiteside II

Approximately half of the land in the open area is held in fee. Most of the open area is rangeland, and land used for agriculture, and residential and commercial developments. Agriculture and related activities are the primary source of income. Non-members are permitted to move freely in this area. The County maintains an extensive road system of nearly five hundred miles throughout the open area. Most of the fee land lies within the three incorporated towns of Toppenish, Wapato and Harrah. The rest is scattered throughout the reservation in a checkerboard pattern, some clustered in particular areas. Roughly eighty percent of the population of the open area, including that of the incorporated towns, are non-members of the Yakima Nation. It appears that neither Yakima

Nation nor the County regulates land use within the incorporated towns.

Under Yakima Nation's Amended Zoning Ordinance, the Wilkinson property is zoned "agricultural". This designation indicates that the "principal use of the land is for agricultural purposes". All buildings are prohibited except agriculture related buildings, agriculture product processing plants, buildings on public parks and playgrounds and single family dwellings. The minimum lot size is five acres. This is the only type of agricultural district under the Yakima Nation's Code.

The County's agricultural zones include three types: "exclusive agricultural", "general agricultural", and "general rural". Under "exclusive agricultural" lot size minimums are forty acres, under "general agricultural",

twenty acres, and under "general rural", one acre. The County has designated the Wilkinson property as "general rural". This zoning is intended to "'provide protection for the county's unique resources and land base;' 'minimize scattered rural developments . . . by encouraging clustered development;' and 'permit only those uses which are compatible with [the] rural character.'" Unpublished district court opinion in Whiteside II, at 7-8. The number and variety of uses possible under special use permits is considerably greater than those allowed within exclusive and general agricultural districts. As noted above, the County has other extensive land-use regulations.

The Wilkinson property is a forty-acre tract of fee land about three-quarters of a mile south of the reserva-

tion's northern boundary. The City of Yakima is three miles to the north of the tract. The property is vacant sagebrush land.

In September, 1983, Wilkinson applied to the Yakima County Planning Department to subdivide thirty-two acres into twenty lots ranging in size from 1.1 to 4.5 acres, each lot to be used for a single family residence. Wilkinson submitted an environmental checklist from which the Planning Department initially determined that an EIS was required. However, the Planning Department issued a Declaration of Non-Significance after Wilkinson agreed to modify his proposal. Yakima Nation appealed, arguing that the County was without authority to regulate and that the proposal would significantly affect the environment. The

Commissioners affirmed and Yakima Nation filed suit in federal court.

DISCUSSION

I. Public Law 280

[1] Brendale and the County maintain that Washington's enactment of Wash. Rev. Code § 37.12010, adopted pursuant to Pub. L. No. 280, 67 Stat. 588 (1953), as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 and Supp. III 1985) (Public Law 280), divested Yakima Nation of authority to regulate the activities of non-Indians on fee-owned land within reservation boundaries. This argument lacks merit. Public Law 280 grants state courts jurisdiction over civil litigation involving reservation Indians, but does not intrude upon tribal regulatory authority. California v. Cabazon Band of

Mission Indians, 107 S.Ct. 1083, 1087-88 (1987). Because zoning is clearly regulatory, Public Law 280 does not affect Yakima Nation's authority to zone.

II. Preemption and Infringement

[2] Yakima Nation's claim, in essence, is that the state, acting through the County, is barred from imposing its zoning ordinances to control non-member fee land on the reservation. States may impose laws on non-members engaged in activities on Indian reservations unless a given law is preempted by federal law or unless it "'unlawfully infringes on the right of reservation Indians to self-government'". United States vs. Anderson, 736 F.2d 1358, 1363 (9th Cir. 1984) [quoting Colville Confederated Tribes vs. Walton, 647 F.2d 42, 51 (9th Cir.), cert. denied, 454 U.S.

1092 (1981)]. We must balance the interests of federal, tribal and state authorities to determine whether a state is precluded from regulating particular conduct of non-members on Indian reservations. White Mountain Apache Tribe vs. Bracker, 448 U.S. 136, 145 (1980); see also Segundo vs. City of Rancho Mirage, 813 F.2d 1387, 1391 (9th Cir. 1987).

1. Federal Preemption

[3] Yakima Nation asserts that federal law preempts the application of state law. It lists a number of federal statutes that Yakima Nation maintains embody federal policy to provide for tribal self-government and the protection of reservation resources. Broad preemptive effect is accorded not only specific federal statutes, but the policies animating them. Ramah Navajo

School Bd. v. Bureau of Revenue, 458 U.S. 832, 838 (1982). We, therefore, construe preemption generously, and may find preemption even if Congress has not expressly stated an intention to preempt state law. Id.

Yakima Nation is correct that many of these statutes, see, e.g., Indian Financing Act of 1974, 25 U.S.C. § 1451, et seq. (1982); Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, et seq. (1982); Indian Civil Rights Act of 1968, 25 U.S.C. z 1301 et seq. (1982), embody and advance a broad federal policy of recognizing Indian sovereignty and encouraging tribal self-government. See New Mexico vs. Mescalero Apache Tribe, 462 U.S. 324, 334-35 & n.17 (1983). Others facilitate and encourage tribal management of Indian resources. If particular note, the Indian Self-

Determination and Education Assistance Act, 25 U.S.C. § 450 et seq. (1982 and Supp. III 1985), authorizes the Secretary of the Interior, upon a tribe's request, to enter into a contract with the tribe, to reallocate management of land use programs involving trust land, including zoning, from the federal government to the tribe. 25 C.F.R. § 271.32 (1986). These statutes may not establish the "comprehensive and detailed federal involvement in or regulation of the particular tribal activity", Chemehuevi Indian Tribe v. California State Bd. of Equalization, 800 F.2d 1446, 1448 (9th Cir. 1986), cert. denied, 107 S.Ct. 2184 (1987), necessary to find federal pre-emption, that existed in Bracker, 448 U.S. at 145-48, or in Segundo, 813 F.2d at 1392-94. At a minimum, however, they embody a federal policy that informs our

inquiry concerning the reach of Indian sovereignty.

2. Tribal Authority

Before we may consider Yakima Nation's interest in regulating non-member fee land, we must determine whether it possesses the requisite regulatory authority. The Supreme Court has long recognized the inherent "attributes of sovereignty [in Indian tribes] over both their members and their territory". Iowa Mut. Ins. Co. vs. LaPlante, 107 S.Ct. 971, 975 (1987) [quoting United States vs. Mazurie, 419 U.S. 544, 557 (1975)]. Yakima Nation derives authority not only implicitly from its status as a dependent sovereign, but explicitly from the Treaty with the Yakimas, 12 Stat. 951, 2 Kapplers 524 (1855), in which Yakima Nation and the United States

agreed that Yakima Nation reserved to itself and was guaranteed a right to its "own government" and its "own laws".

[4] Tribal authority extends to regulation over the activities of non-Indians on reservation lands. Iowa Mutual, 107 S.Ct. at 978. Such authority, however, is more limited than that over Indians. The Supreme Court has, without apparent consistency, applied two tests to determine the limit on tribal authority over the conduct of non-Indians. In Washington vs. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), the Court held that tribal sovereignty is divested only when its exercise is inconsistent with overriding federal interests. "[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Govern-

ment, not the States." Id. at 154. Nine months later, the Supreme Court in Montana vs. United States, 450 U.S. 544 (1981), reiterated language disregarded by Colville, that Indian tribes have been implicitly divested of their sovereignty to regulate relations between the tribe and non-members by virtue of their dependent status. Id. at 563-64 [citing United States vs. Wheeler, 435 U.S. 313 (1978)]. The Court held that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Id. at 564.

The Montana Court identified two exceptions to the limitations on tribal regulatory authority over non-members.

The exceptions stem from inherent tribal authority over the tribe's members and to manage its territory as well as the power to exclude non-members from its reservation. Anderson, 736 F.2d at 1364, Babbitt Ford, Inc. vs. Navajo Indian Tribe, 710 F.2d 587, 592 (9th Cir. 1983), cert. denied, 466 U.S. 926 (1984). A tribe retains authority to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana, 450 U.S. at 565. A tribe also retains inherent regulatory authority over the conduct of non-Indians on fee land when the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the

tribe." Id. at 566 (the "tribal interest" test).

[5] Yakima Nation asserts that we should apply the Colville test and hold that it has authority to zone non-Indian fee land under that test. Because we conclude that Yakima Nation has authority under the more stringent tribal-interest test employed in Montana, we need not determine whether the Colville analysis is appropriate to determine tribal authority over non-Indians.[1]

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[1] Most of our cases have applied the Montana test, without referring to the conflicting language in Colville, to determine whether a tribe has the power to regulate non-Indians within reservation boundaries. See, e.g., United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), cert. denied, 466 U.S. 926 (1984); Cardin v. De La Cruz, 671 F.2d 363 (9th

[6] We recently held that "[i]t is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands." Segundo, 813 F.2d at 1393 (holding that a city could not apply its rent control ordinance in conflict with tribal ordinance to non-Indians on reservation trust land). Zoning, in particular, traditionally has been considered an appropriate exercise of the police power of a local government, precisely because it is designed to promote the health and

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Cir.), cert. denied, 459 U.S. 967 (1982). We did, however, apply both tests in Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), cert. denied, 459 U.S. 977 (1982).

welfare of its citizens. See Knight vs. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation, 670 F.2d 900, 903 (10th Cir. 1982); see generally Village of Euclid vs. Ambler Realty Co., 272 U.S. 365 (1926). By enacting zoning ordinances, a tribe attempts to protect against the damage caused by uncontrolled development, which can affect all of the residents and land of the reservation.[2]

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[2] The Yakima Nation's Code sets out its purpose: The controls as set forth in this ordinance are deemed necessary in order to encourage the most appropriate use of the land, to protect the social and economic stability of residential, agricultural, commercial, industrial, forest, reserved and other areas within the reservation, and to assure the orderly development of such large areas; and to obviate the menace to the public safety resulting from the improper location of buildings and the uses thereof, and the establishment of land uses along primary highways in such a manner as to cause interference with existing and proposed traffic movement on said highways; and to otherwise promote the public health, safety, morale and general welfare in accordance with the rights reserved by the Yakima Indian Nation.

Tribal zoning is particularly important because of the unique relationship of Indians to their lands. Comment, Jurisdiction to Zone Indian Reservations, 53 Wash.L.Rev. 677, 680 (1978).

[7] Further, a major goal of zoning is the "systematic and coordinated utilization of land" in a particular area. N. Williams, American Land Planning Law, § 1.06 (1974), cited in Comment, 53 Wash.L.Rev. at 679. Comprehensive planning enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses in a desirable pattern. Id. at § 1.08, cited in Comment, 53 Wash.L.Rev. at 685. Yakima Nation has exclusive authority to zone tribal trust land, which constitutes nearly all of the closed area and over half of the open area. Although the fee

land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checkerboard pattern. If we were to deny Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme. This we are unwilling to do.

3. Balance of Interests

Having concluded that Yakima Nation has the authority to zone non-Indian fee land within the reservation boundaries, we must consider whether the interests of Yakima Nation, as shaped by federal policy, outweigh those of the County. We review the district court's findings of fact, including its balancing of the

interests, under a clearly erroneous standard.

A. Whiteside I

In addition to its general interest in asserting political authority - an interest that, as noted above, federal policy seeks to advance - Yakima Nation has a significant interest in zoning the closed area of the reservation. To protect grazing, forest and wildlife resources, Yakima Nation restricted the closed area to its members and permittees in 1954 and the Bureau of Indian Affairs restricted use of federally maintained roads in the closed area in 1972. The closed area is relatively undeveloped, with no permanent residences in the Yakima County portion of the area, and residences in other portions predate the zoning ordinance. The closed area, which

is about two-thirds forested, provides substantial economic support to the tribe through timber operations, and supplies many Yakima Nation members with a food supply. Its religious and spiritual value also motivates the Yakima Nation's protection of the closed area from development.

The district court found that the Brendale development would cause disruption of Yakima Nation's interests. Construction and use of roads and cabins would cause soil disturbance and erosion, deterioration of ambient air quality, change of water absorption rates and drainage patterns, destruction of some trees and natural vegetation, likely alteration of migration patterns of deer and elk, increased noise levels and thicker population density. Development

would necessitate new police and fire services.

The County's zoning classification, if applied, would permit the construction of such structures as single family dwellings, commercial campgrounds, overnight lodging facilities with less than six units, restaurants, and bars in the restricted area. The imminence of such construction is suggested by the fact that Brendale, himself, has stated he intends to build other developments on land adjacent to the property which is the subject of this suit. The district court's recognition of Yakima Nation's concern with maintaining the character of the closed area indicates that the court properly focused on Yakima Nation's interest in regulating the entire closed

area, including the Brendale property.[3]

By contrast, Brendale has not identified any interest the County has in regulating the closed area. The district court noted that the only interest asserted by the County was a general interest in providing regulatory functions to its taxpaying citizens. Further, Brendale has not argued that the Yakima Nation's regulation of the closed area has an effect outside the boundaries of the reservation.[4]

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[3] Brendale points out that Yakima Nation constructed a permanent structure of twelve dormitory cabins and two larger buildings in the closed area. Even if Brendale's development would have no greater impact on the closed area than the Yakima Nation's structure, a question the district court never considered, we believe the proper analysis addresses the multiplied burden of potential additional development that could occur if the Yakima Nation zoning ordinance were revoked.

[4] Perhaps noteworthy, the County, itself, did not join Brendale in appealing the district court's decision.

We conclude that the district court properly found that the County is precluded from zoning fee land within the closed area because the County's interest in imposing its regulation is outweighed by the significant interests of Yakima Nation.

B. Whiteside II

[8] Yakima Nation has alleged a number of justifications for regulating the open area and in particular the Wilkinson property.[5] The County, by

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[5] As alleged, Yakima Nation's interest in controlling land use in the open area, although obviously less compelling than that in the closed area, appears also to be strong. The open area is largely used for agriculture, upon which many tribal members depend for their livelihood. Specifically with regard to the Wilkinson property, Yakima Nation has asserted that the proposal would require the construction of new roads and could alter the flow and quantity of ground water. Yakima Nation alleges that there is a substan-

contrast, has not suggested any off-reservation interest in imposing its zoning code on fee land within the reservation. See Mescalero Apache, 462 U.S. at 336 ("The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. Thus a State seeking to impose a tax on a transaction between a tribe and nonmembers must point to more than its general interest in raising revenues.

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tial danger of severe erosion and runoff from the subdivision and that the contemplated change in the land use of the Wilkinson parcel and development of the surrounding area, would interfere with Yakima Nation's interest in the integrity of its culture and way of life. Sacred burial grounds are located in the area. Finally, Yakima Nation alleges that increased development would require additional police services.

A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention.") (citations omitted).

[9] We conclude, however, that for this court to weigh the varying interests at this time would be premature. Because the district court found that Yakima Nation lacked the authority to zone fee land owned by non-Indians within the open area, it did not make findings of fact concerning the interests asserted, nor did it balance the federal, tribal, and state interests. We therefore remand to the district court the issue of whether the interests of Yakima Nation, as shaped by federal policy, outweigh the interests of the County in imposing zoning ordinances on fee land owned by non-

Indians in the open area.

CONCLUSION

The district court's judgment in Whiteside I is affirmed. Its judgment in Whiteside II is reversed and remanded.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,	)	
Plaintiff,	)	NO. C-83-604-JLQ
vs.	)	February 2, 1984 Yakima, Washington 4:30 o'clock P.M.
JIM WHITESIDE, GRAHAM TOLLEFSON, CHARLES KLARICH, RICHARD ANDERWALD, PHILIP BRENDALE and FRANK GLASPEY,	)	
Defendants.	)	

O R A L D E C I S I O N

The Honorable Justin L. Quackenbush,
Judge.

APPEARANCES:

On behalf of the Plaintiff:	HOVIS, COCKRILL, WEAVER & BJUR By: JAMES B. HOVIS Attorney at Law 316 North Third St. Yakima, WA 98907
On behalf of Defendants Whiteside, Tollefson, Anderwald and	OFFICE OF THE PROSECUTING ATTORNEY By: JEFFREY C. SULLIVAN Yakima County

Klarich:	Courthouse Yakima, WA 98901
On behalf of the Defendants Brendale and Glaspey:	FLOWER & ANDREOTTI By: CHARLES C. FLOWER Attorney at Law 303 East "D" Street Yakima, WA 98901

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FEBRUARY 2, 1984
AFTERNOON SESSION.

THE COURT: In this case and during the trial of this case I believe it was yesterday afternoon, I suggested to the parties that it appears to me that a reasonable resolution of this matter would be or could be accomplished by a rational, dispassionate discussion of the issues between the parties. That, obviously, has not taken place throughout the history, the relatively short history of this matter. Therefore, it is incumbent upon me to, one, find the facts in this case, which I will do, and secondly,

to apply the law as it exists to those facts and in that way determine this matter.

My preference as to a resolution without the necessity of this litigation have nothing whatsoever to do with my decision in this matter. Obviously, I would prefer a reasonable compromise between the parties. I will decide the case without any regard whatsoever to what my preferences would be. I have an obligation and I took an oath to decide the case based upon the law of the land.

This action by the Yakima Indian Nation seeks to restrain the proposed residential development by Mr. Brendale in the closed or timbered section of the Yakima Reservation. The county, without passing upon the merits of the individual proposal, has determined that it has jurisdiction over this land, and, there-

fore, the authority to issue the appropriate ordinances and/or permits to Mr. Brendale if, in their discretion, the county commissioners determine that the proposed development after consideration of an EIS, which they have required, is an appropriate one.

I'm sure it is clear to counsel, but I want it made clear to the parties and to others in attendance, that this decision is limited to the Brendale property and the property within the closed area of the Yakima Reservation.

I accept the line as shown on the exhibit that we have utilized. The question of jurisdiction in the area to the east of the closed area is the subject of another action pending in this court, which is to be heard by this court in March. I will decide that case based upon the individual facts presented to

the court during that trial. I am going to decide this case based upon the record that has been made this week in this individual case.

The issues raised in this action involving the closed area of the Yakima Reservation requires an analysis by me of the inherent powers retained by the Tribe as opposed to those powers of the Tribe of which they have been divested. This action involves the issue of the power of the Tribe to regulate land use rather than any claim by the Tribe to regulate persons on their fee land such as a claim of criminal jurisdiction which we all acknowledge was decided in Oliphant; to-wit, that the Tribe does not have criminal jurisdiction over non-Indians.

The Yakima Indian Reservation was established in 1855 by treaty. A treaty is, in fact, a form of a contract or

agreement. Both sides, the United States of America and the Indian Nation, are bound by the terms of the treaty or contract. The Tribe in that treaty gave up their rights to their millions of acres of land to which they laid claim in exchange for the promises which were made by the United States of America. It is recognized and established that Congress has the right to alter the terms of the treaty and, in fact, as I suggested during argument, could terminate the very existance of this or any other Indian reservation, but only after paying just compensation.

The history of the dealing by Congress with the Tribes after treaties, after the United States had entered into agreements causes many people great concern. Congress went from the position of an agreement or a treaty to one of

assimilation, to one of the Dawes Act of allotments, on then to the somewhat recent philosophy of termination, and now it seems we have come full circle back to a philosophy of sovereign immunity. Those matters, of course, are political decisions for Congress. I, of course, am bound by the acts of Congress as interpreted by the courts of the United States.

Despite this history, the Indian Tribes have long been recognized as sovereign entities possession attributes of sovereignty over both their members and their territory. This sovereignty, however, is not absolute. The Tribe is limited by the terms of the treaty. The Tribe is limited by the laws as passed by Congress, and to some extent the Tribes are also limited by their dependent status. As a result of this, the Tribes

no longer possess the full attributes of a sovereignty.

It is undisputed that the Indian Tribes have jurisdiction over Indians on their reservation. It is undisputed that the Tribes, likewise, have jurisdiction over the Indian lands. The most difficult and unanswered, in my opinion, jurisdictional question is that before the Court: The question of the power of the Indian Tribes to regulate fee lands owned by non-Indians, which lands, fee lands, are located within the boundaries of an Indian reservation.

I feel that the law is clear that Indian Tribes retain the inherent power to exercise some form of civil jurisdiction over non-Indians on the reservation. This power, however, is limited as is set forth by the numerous decisions of the Supreme Court and the appellate courts.

In this case, I must follow the teachings of the United States Supreme Court.

One of its most recent decisions is the New Mexico case, New Mexico v. Mescalero Apache Tribe decided by the United States Supreme Court on June 13th of 1983. In that case, the Court recognized that there must be a demarcation of the spheres of jurisdiction as between state or local and tribal authority in and on Indian reservations. The Court pointed out that the United States Supreme Court has continued to stress that Indian Tribes are unique aggregations, once again possessing attributes of sovereignty over both their members and their territory. Under some circumstances, a state or local government may exercise concurrent jurisdiction over non-Indians on tribal reservations; however, that authority may only be

asserted if, in fact, there is some showing of a legal basis as argued by counsel for the defendants; to-wit, Public Law 280, and only if that authority of the Tribe has not been preempted by the operation of Federal law, and also that the authority of the state or local government has not been preempted by Federal law.

In this case, I have determined that Public Law 280 does not preempt the exercise by the Tribe of its authority over the land here in question located in the closed area. Much discussion and debate has taken place concerning the case of Montana v. The United States, but that decision came down from the Supreme Court in 1980. The subsequent decisions of the United States Supreme Court have not retreated from the language found in that case; to-wit, that a Tribe may and

does retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

In my opinion, the cultural needs and the culture itself of the Yakima Indian Nation as presented in this case clearly establish that the cultural interests, whether they be associated with the religious interests or not, are strong as they relate to the closed area in the Yakima Indian Reservation.

I adopt the findings of the county commissioners at the time of the hearing on the declaration of non-significance. Clearly the action proposed by Mr. Brendale is to take place in the center

of a large undeveloped forest. I asked Mr. Brendale and invited, I'm sure, testimony, if it was available from counsel, as to whether or not within the closed area other than the structures, the permanent structures erected by the Tribe for its specific uses, if there was a permanent residence on fee land within the closed area. Evidently, none exist within Yakima County, which I find from the evidence and testimony of Mr. Williams comprises 740,000 acres in the closed area in Yakima County. There are 25,000 acres of fee land within the closed area in Yakima County. Eighteen thousand acres of that fee land is owned by the St. Regis Lumber Company. Based upon those figures, which I find to be true, ninety-seven percent of the land within the closed area is non-fee land; to-wit, either Indian owned or trust

lands. Utilizing the 18,000 acres of fee land owned by St. Regis, that would leave some 7,000 acres, or one percent of the land not owned by either the Tribe or allottees, or the St. Regis Lumber Company.

I adopt the findings of the Board of County Commissioners set forth in Exhibit 7. Since I intend to finalize this decision by way of a written opinion, I will not recite those specific items at this time.

I further find from the testimony that this area is one of great value, not monetarily necessarily, but culturally and historically and religiously to the Yakima Indian Nation and to the individual members of both young and old.

I conclude and I find that the development of the Brendale property for residential uses is completely incom-

patible with the uses to which the Tribe has put its land since, in fact, the treaty and before then. I find that the logging of the land is in the manner in which the Tribe is harvesting the timber is not inconsistent whatsoever with the deep feeling that the members of the Tribe have concerning this closed area. Based upon those findings and the other findings which I will incorporate in the written opinion, I find that in fact the prongs or tests set forth in the Montana case have been met by the Tribe.

I find that development within the closed area in a manner such as proposed by Mr. Brendale is completely inconsistent with the political integrity, the economic security, and particularly the health and welfare of members of the Yakima Tribe, who, I find to, in fact, rever this area as being the land of

their ancestors. I, therefore, find that the Yakima Indian Nation has the authority to require compliance with the zoning code of the Yakima Indian Nation.

With regard to the Public Law 280 argument, I agree thoroughly with you, Mr. Sullivan, that we would have had a bright line if someone, and it's difficult for me to believe that it wasn't raised in Cardin vs. DeLaCruz, if someone would have raised the issue when it was ripe on the Cardin issue, but it was not raised, I must make the decision and I am satisfied that Public Law 280 did not, in fact, divest the Tribe of their inherent right to manage or to apply their zoning code to the very limited fee land owned by non-Indians in the closed area under these facts and circumstances. This is a unique case. I question if there is another area such as

this in view of the prior policy, that somewhat vacillating policy from Congress towards the Indians that has a forested area, an area of cultural significance with the roots and berries and the artifacts which I find are important matters, cultural matters, religious matters to the Indian Tribe that has this limited amount of fee land.

With regard to the question of concurrency; to-wit, does Yakima County have the authority to concurrently impose their zoning ordinance in this case on the closed area, as I have indicated there are some circumstances whereby a state may exercise concurrent jurisdiction, and a strong argument can be made that by reason of Public Law 280 whereby Congress gave the state of Washington civil and criminal jurisdiction that the state and the local governments have, in

fact, concurrent jurisdiction. However, the analysis does not stop there.

Even with Public Law 280, I believe that the sovereignty which the Tribe has over the lands within their boundaries, and in this case within the closed area, are such that the analysis must follow as to whether or not the Public Law 280 jurisdiction or the local jurisdiction has been preempted by Federal law. This determination, the question of preemption, cannot be made upon the usual mechanical analysis of the basic principles of preemption.

In cases of the Supreme Court and of the Circuit Court of Appeals, the analysis does not stop at the question of state laws versus Indian Tribes. The Bracker case cited to the Court by counsel recognizes the unique historical origins of Tribes which are recognized,

and the unique historical origins of those Tribes' sovereignty and the Federal commitment to Tribal self-sufficiency make it, "...treacherous to utilize only those basic notions of preemption." Those cases have, in fact, rejected a very narrow focus on congressional intent, and those cases have also rejected the proposition of preemption requiring an express congressional statement to that effect; that, to-wit, under these circumstances state or local authority is preempted.

The exercise of state or local authority which imposes additional burdens upon the Tribe must ordinarily be justified by the functions or services to be performed by that local government or by that state in the exercise of its alleged on reservation jurisdiction. This requires the court to analyze the

reasons claimed by the local government for its attempt to exercise the regulatory function.

In this case, I find that the county has failed to identify regulatory function or service that would justify the assertion by the county of concurrent regulatory authority. I likewise find that the county has failed to point to any off reservation effects that would warrant intervention by the county in the imposition of the county zoning ordinance on this property located in the middle of a 740,000 acre undeveloped tract. For those reasons, I find that Federal law preempts the exercise or the imposition of the county zoning ordinance upon fee land owned by non-Indians located within the closed area of the Yakima Indian Reservation.

As indicated, I will place my decision in final written form; however, before we get to that final aspect of this case, we have the 1983 claim, and in view of the amendment, the qualified immunity claim and affirmative defense set forth by Mr. Sullivan. I will allow you, Mr. Hovis, fifteen days to respond, and do you want to be in a position of responding at this point, Mr. Flower, or would you prefer to reply with Mr. Sullivan?

MR. FLOWER: We would like to respond, Judge.

THE COURT: All right. I will allow you fifteen days, and I'll allow you ten days to reply, Mr. Sullivan.

MR. SULLIVAN: Thank you, your Honor.

THE COURT: I might say, as you know we alternate three or four months at a

time coming here to Yakima, and we start back in March. What is the date?

THE CLERK OF THE COURT: The 19th.

THE COURT: It may well be if you desire to argue the 1983 issue, the entitlement of the Tribe to damages, we should be in a position of being able to accomodate you during that week of the 19th, if anyone wants argument.

MR. FLOWER: Unless the laws have changed and are different, I don't think there would be any need to. Obviously, I think on March 19th, I'll be here anyway, and so will Hovis.

THE COURT: What is that?

MR. FLOWER: Whiteside II.

THE COURT: Whiteside II is in May.

THE CLERK OF THE COURT: Pretrial conference is in April and the trial is in May.

THE COURT: Well, be here if you wish to argue the 1983 issue.

Pending the written decision which I will prepare in this matter, and I recognize, Mr. Flower, that you would like to move this matter along and get the final order entered, but I do need to make the decision on the 1983 civil rights portion. I would hope that I would be in a position to have that done by the time we are back here in March. But, if either side wants an oral argument on the 1983 issue, notify Mrs. Buckner within fifteen days. You can do it in your brief. If you just specify oral argument waived or requested, and if you would do that, too, Mr. Flower.

MR. FLOWER: Surely.

THE COURT: And if you wish argument, Mr. Hovis, if you just send a letter to the Clerk as to oral argument.

MR. HOVIS: Thank you, your Honor.

(Whereupon, hearing was concluded in this matter at 5:00 o'clock, P.M., February 2, 1984.)

C E R T I F I C A T E

STATE OF WASHINGTON)
: ss.
COUNTY OF SPOKANE)

I, Mia M. Bohn, RPR, do hereby certify that I am an Official Court Reporter in the United States District Court;

That as such Official Court Reporter, I attended the proceedings in the foregoing entitled matter;

That I took down in shorthand all oral testimony adduced and proceedings had;

That such shorthand was reduced to writing under my supervision;

That the foregoing pages of type-written matter contain a true and accurate excerpt of proceedings taken from my shorthand notes as aforesaid.

/s/
MIA M. BOHN, RPR
Official Reporter
U.S. District Court
Eastern Dist. of Wash.
Spokane, Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

YAKIMA INDIAN NATION,	)	
Plaintiff,	)	NO. C-83-604-JLQ
vs.	)	MEMORANDUM OPINION
WHITESIDE, et al.,	)	
Defendants.	)	

The Yakima Indian Nation (Yakima Nation) brought this suit seeking a declaratory judgment and injunction barring the defendants from taking or permitting any land use within the "Closed Area" which is contrary to the Amended Zoning Regulations of the Yakima Nation (Yakima Nation Code). The named defendants are the Yakima County Commissioners, the Director of Yakima County Planning Department, and Philip Brendale, record owner of fee land within the exterior boundaries of the Yakima

Indian Reservation (Reservation).[1] Specifically, the plaintiff seeks to impose its zoning and land use law on a development proposed by defendant Brendale within the so-called "Closed" area of the Reservation. Additionally, the Yakima Nation seeks the court to limit Yakima County's regulatory authority over this property to the extent that the County's laws would allow land uses inconsistent with those permitted by the plaintiff. In other words, the plaintiff seeks a judicial declaration that its regulatory jurisdiction over Brendale's property is paramount and exclusive.

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[1] In addition to those defendants, the complaint also named Frank Glaspey, co-developer of the proposed Brendale property development. By court Order dated February 10, 1984, defendant Glaspey was dismissed with prejudice. (Ct. Rec. 127).

The plaintiff's complaint also contains allegations of civil rights deprivations. More particularly, the Yakima Nation contends that the County's assertion of its zoning jurisdiction over the Brendale property violated Section 1 of the Civil Rights Act of 1871. (Codified at 28 U.S.C. § 1983).

The court has previously entered both a Temporary Restraining Order and a Preliminary Injunction which restrained defendant Brendale from changing the land use of the subject property (Ct. Rec. 12, 42). Thereafter, a four day trial was held and at its conclusion the court entered an oral decision favorable to the plaintiff.[2] (Ct. Rec. 128). What

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[2] The court's oral decision encompassed only the plaintiff's request for a declaratory judgment on the regulatory jurisdiction issue. The Yakima Nation's Section 1983 claim was expressly excluded from the oral decision but is addressed in this written opinion.

follows is the court's written opinion including its Findings of Fact and Conclusions of Law. This written opinion shall supplement the court's oral opinion.

FACTUAL BACKGROUND

The Yakima Indian Nation is a composite of fourteen (14) originally distinct Indian tribes who banded together in the mid-1900's for the purpose of negotiating with the United States. Pursuant to a treaty signed in 1855 and ratified in 1869, 12 Stat. 951, these various tribes ceded vast areas of land but also reserved an area for their "exclusive use and benefit". This reserved area is the Yakima Nation Indian Reservation (Reservation).

The Reservation is located in south-eastern Washington. It's exterior boundary encompasses approximately 1.3 million acres of land. Of this amount, about eighty percent of the land is held in trust by the United States for the benefit of the Tribe or its individual members (trust lands). The remaining land is held in fee by Indians or non-Indian owners (fee land). The majority of this fee land lies within the three incorporated towns in the northeastern part of the reservation -- Toppenish, Wapato and Harrah. The remainder is scattered throughout the reservation creating the now familiar "checkerboard" effect. The fee lands fall within the boundaries of Klickitat, Lewis and Yakima Counties.

Most of the trust land lies within the Reservation's "Closed Area". This

area occupies essentially the western two-thirds of the Reservation. It covers approximately 807,000 acres, 740,000 of which fall within Yakima County. Of this latter figure, 25,000 acres are fee land. The Closed Area is predominantly forested (about two-thirds), the balance being classified as range land. The topography of this area varies from the gently sloping range land along its eastern edge, to deep river valleys in the central part and finally to the mountain peaks of the Cascade Range along its western boundary. A state-maintained highway, U.S. 97, cuts across the south-eastern portion of the area and several Bureau of Indian Affairs (BIA) maintained arterials provide access to the closed area's interior.

Apart from the "exclusive use and benefit" language in the treaty, it is

unclear when the "Closed Area" was officially declared off-limits to the general public. It is undisputed that by Tribal Resolution dated August 11, 1954, the area was declared "to remain closed to the general public" to "protect the [Closed Area's] grazing, forest and wildlife resources." Entry into the area was restricted to enrolled members of the Yakima Tribe, official employees, permittees and persons with bona fide business and property interests. Access to the area was further limited when, in May 1972, the BIA restricted the use of the federally maintained roads within the Closed Area to Tribal members and permittees who were either record land owners or associated with the Yakima Nation through employment, business, or

in some way directly benefitting the Yakima Nation.[3]

The Yakima Nation currently has a Courtesy Permit System which has expanded the original categories of permittees to include spouses and dependents of enrolled members, plus special groups or dignitaries visiting the reservation. For the stated purpose of the "protection and enhancement of its [Closed Area] natural resources, natural foods, medicines, game wildlife, [and] environment . . . " the permitted uses are limited to sightseeing, hiking, camping

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[3] Defendant Brendale judicially challenged this closure on equal protection grounds but the court concluded no violation occurred. United States v. Philip Brendale, et ux, C-74-197 (E.D. Wash. Aug. 27, 1974) (memornadum decision). In a later action, however, Mr. Brendale was granted an easement by necessity. Brendale v. Olney, et al., C-78-145 (E.D. Wash. Mar. 2, 1981) (memorandum decision).

and tribal, BIA, or family related business or activity. Permittees (i.e. non-tribal members) are specifically prohibited from hunting, fishing, boating, drinking, operating vehicles off established roads, camping at other than designated campsites and removing flora, fauna, petrified wood, other valuable rocks or minerals or artifacts. Ingress and egress is monitored and controlled by four tribally-operated guard stations. Tribal police and game officers patrol the interior of the area.

Tribal Land Use Regulations:

In October 1970 the Yakima Nation instituted its first Zoning Ordinance. That ordinance was a six-page Tribal Resolution modeled after a similar Yakima County ordinance. The Zoning Ordinance designated all areas within the exterior boundaries of the reservation, both trust

and fee lands (except the incorporated cities and towns) as being within the General Use District. All otherwise lawful uses were generally permitted except certain activities requiring a conditional use permit. E.g., asphalt mixing plants, junk yards, certain feedlots, above ground storage tanks, etc. The Board of Adjustment, composed of all the members of the Tribal Council, sat as the Board of Appeals from administrative decisions and the Hearing Board for conditional use applications. Its decisions were the final tribal action.

In May 1972, the Yakima Nation adopted a new zoning law, the Amended Zoning Ordinance, which remains in effect today. Like its predecessor, the Amended Zoning Ordinance expressly is made applicable to fee land. Besides that similarity, this twenty-seven page

document resembles the original ordinance only in the composition of the Board of Adjustments and its function. Otherwise, it is much more detailed and comprehensive. Among other things, it establishes a requirement for building permits, minimum lot sizes, authorizes the establishment of Planned Development Districts, provides for Special Use Permits and creates five categories of Use Districts. These Use Districts are: Agricultural, Residential, Commercial, Industrial, and Reservation Restricted Area.

The Reservation Restricted Area is another term for the Closed Area. It was established as a "special use district" to insure continuation of the Tribal natural resources and to insure the Treaty right of tribal members to have an area in which they can camp, hunt, fish,

and gather roots and berries in the tradition of their culture. Within this district only the following uses are permitted:

1. Harvesting wild crops;

2. Grazing, timber production or open field crops;

3. Hunting or fishing by Tribal members;

4. Camping in temporary structures;

5. Tribal camps for the education and recreation of tribal members;

6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of tribal resources;

7. No building or other permanent structure or any appurtenances thereto other than those allowed in Sections 1-6 above shall be allowed in this district;

8. Any structure which is authorized in Sections 1-6 above shall be set back 200 feet from any waterway.

These limited uses are the primary source of the present action.

Yakima County Land Use Regulations:

As early as 1946 the County of Yakima regulated land use within its boundaries. This regulation was, however, not extensive until 1965 when the county adopted its first zoning ordinance which, as stated previously, was the model for the Yakima Nation's initial zoning ordinance.

The present comprehensive zoning regulations, The Yakima County Code, was first enacted in 1972. It was struck down for a procedural defect, but readopted in its same form in October, 1974. Within its seventy-two pages, the Yakima County Code identifies numerous specified use districts which generally regulate agricultural, residential, commercial, industrial, and forest-

watershed uses. In the reservation area, the official county zoning map segregates the fee lands from the trust lands. The county does not apply its zoning law to trust lands.

The fee lands within the Closed Area are zoned "forest watershed". This designation allows a diversity of uses including, for example, single family dwellings; commercial camp grounds; overnight lodging facilities having less than sixteen (16) units; restaurants, bars; general stores; souvenir shops; service stations, marinas, saw mills and the construction of dams for the production of electricity. The minimum lot size for this use district is one-half acre, but the average size of any subdivision or short plat must be two acres. The stated purpose for the Forest-

Watershed District is to facilitate land and water conservation while accommodating residential, recreational and commercial uses.

In addition to its comprehensive zoning regulations, Yakima County has other land use regulations applicable to fee land within the county. Its 1974 Subdivision Ordinance imposes standards for streets, water, sewage, drainage, parks and recreation areas, and school sites. The Yakima County Shoreline Master Program, adopted in 1974 as mandated by state law, regulates certain activities adjacent to shorelines. Also, as a participant in the federal flood insurance program the county attempts to control flood plain development, although it is not clear whether any Closed Area fee lands lie within an identified flood plain. Another of Yakima County's state-

mandated land use regulations is its Environmental Ordinance which requires a review of the potential environmental impact of all non-exempt land use actions. None of the above-described regulations have been applied to trust lands on the Yakima Nation Reservation.

The Brendale Property:

Defendant Brendale owns a 160 acre tract of fee land approximately in the center of the forested portion of the Closed Area.[4] The 160 acre parcel was originally allotted to Brendale's great aunt, a member of the Yakima Nation, and later inherited by Brendale's mother and grandfather who were issued a fee patent

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[4] Although Philip Brendale is partially of Indian blood, he is not a member of the Yakima Nation as his blood quantum apparently is not sufficient to entitle him to enrolled status in the Yakima Nation.

in 1963. At his mother's death in 1972, the fee parcel passed to Philip Brendale.

In January, 1982, Philip Brendale filed four contiguous short plat applications with the Yakima County Planning Department. In compliance with the Environmental Ordinance, Mr. Brendale submitted an Environmental Checklist from which the planning department could assess the potential impact of his proposed development and decide whether an Environmental Impact Statement (EIS) was warranted. Having determined that the short platting did not require an EIS because it would not significantly affect the environment, the planning department issued a "Declaration of Non-Significance". Thereafter, the department notified interested parties, including the Yakima Nation, of its determination and requested comments. At the end of the

comment period, during which no reply from the Yakima Nation was received, the short plats were approved.[5]

Approximately one year later, in April 1983, Mr. Brendale submitted a long plat application to divide one of his newly platted twenty-acre parcels into ten two-acre lots. He indicated the lots were to be sold as summer cabin sites, with each site providing its own sewage treatment systems and water supply. After a review of the submitted Environmental Checklist, the County Planning

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[5] Following the approval of the short plats, Mr. Brendale and the Yakima Nation exchanged offers and counteroffers for the sale of his property. Unfortunately, they were unable to agree on a price as the Tribe valued the property in light of the development restrictions imposed on property within the Closed Area by the Yakima Nation zoning regulations and Mr. Brendale valued the property based upon its recreational development potential as permitted by the zoning regulations of Yakima County.

Department issued a Declaration of Non-Significance, thus negating the necessity for an EIS.

Thereafter, the Yakima Nation timely appealed that Declaration of Non-Significance to the Yakima County Board of Commissioners. The grounds for the appeal were two-fold: (1) that Yakima County was without authority to regulate the land use of the Brendale property and (2) that the proposed Brendale development would significantly affect the environment and therefore an EIS was required. Hearings on the Tribe's appeal were conducted by the County Commissioners on August 1, 2, 8 and 9, 1983. During the early states of the hearings, the Yakima Nation strenuously argued the regulatory jurisdictional issue but, based upon advice from the county legal department, the

Commissioners concluded that the appeal was properly before the Board and limited the appellants to presenting evidence as to the EIS issue only. Following hearing testimony from county and tribal witnesses, the Commissioners reversed the decision of the County Planning Department and ordered the preparation of an EIS. The county was in the early stages of preparing an EIS when the present action was initiated by the Yakima Nation.

In addition to the factual background as set forth above, the court makes the following specific factual findings:

FINDINGS OF FACT

1. The proposed Brendale subdivision concerns the following described real property situated in Yakima County, Washington:

The Northwest Quarter and
Southwest Quarter of the
Southwest Quarter of the
Northwest Quarter of
Section 14, Township 8
North, Range 14 East, W.M.

The property is located approximately 25 miles Southwest of the community of White Swan and is northwest of the Intersection of Tepee Creek and IXL roads.

2. The proposed subdivision is fee patent land located within the exterior boundaries of the Yakima Indian Reservation. The property is within the "Closed Area" of the reservation which is accessible only by members of the Yakima Indian Nation and non-members holding permits from the Tribe or the Bureau of Indian Affairs.

3. The Closed Area covers approximately 807,000 acres, 740,000 of which falls within Yakima County. Of the

latter figure, 25,000 acres (or 3.3%) is fee land. The St. Regis Paper Company owns approximately 18,000 of this fee land. The remaining 7,000 fee acres are owned by Indians and non-Indians.

4. The proposed subdivision covers an area of 20 acres and includes ten two-acre lots. The development contemplates the placement of recreational summer cabins and/or travel trailers on the lots.

5. Each lot within the proposed subdivision is to be served by an individual well and an on-site sewage disposal system consisting of a septic tank with drain field or a holding vault. Electricity is to be provided by private generators.

6. The only road access to the proposed subdivision is via Bureau of

Indian Affairs roads. The nearest county road is over 20 miles from the project.

Interior access to the lots would be provided by private roads consisting of re-graded existing logging spur roads or newly constructed roads. The roads would be dirt surfaced and would be maintained by a homeowner's association.

7. The proposed 20 acre subdivision is within a 160 acre quarter section owned by Philip Brendale, the Northwest quarter of Section 14, Township 8 North, Range 14 East, W.M. The proposed plat is bordered on the East and North by other lands within the quarter section owned by Mr. Brendale. It is bordered on the South by lands owned in fee by the St. Regis Paper Company and on the West by lands held in trust by the United States.

The quarter section owned by Mr. Brendale is bordered on the South and East by lands owned in fee by the St. Regis Paper Company and on the North and West by lands held in trust by the United States.

8. The subject property and all surrounding lands are forested.

9. There are currently no structures located on the subject property or on the quarter section parcel owned by Mr. Brendale.

10. The current land uses of the surrounding property include hunting and fishing, food gathering, herb gathering (for medicinal and spiritual purposes), timber production and wildlife habitat.

11. The subject property and all surrounding properties are within the Reservation Restricted Area (Closed Area) use district pursuant to the Yakima

Indian Nation Zoning Ordinance. The purpose of the Reservation Restricted Area is to "insure continuation of the tribal natural resources and to insure the treaty right of tribal members to have an area in which they may camp, hunt, fish and gather roots and berries in the tradition of their culture". Within the Reservation Restricted Area no private buildings are permitted to be constructed.

12. Road construction and cabin site preparation will cause disruptions, displacements, compactions and/or covering of soil and will change ground surface relief features.

13. The proposal will cause a deterioration of ambient air quality due to vehicle exhaust emissions, dust raised on the interior and exterior access roads, and smoke from individual fire-

places or fires.

14. The proposed cabins and private roads will cause changes in absorption rates and drainage patterns. The proposal may cause deterioration of surface water quality due to runoff from disturbed sites. The proposal may alter the direction or rate of flow of ground water and may change the quantity of ground waters by direct withdrawal from wells. The proposal may cause the deterioration of ground waters through seepage from waste water, garbage and sewer facilities.

15. The proposal will result in the destruction of some trees and natural vegetation due to cabin and road construction. The proposal may result in the introduction of new species of flora into the area through gardens or through

inadvertent introduction such as weeds brought in with hay.

16. The proposal will result in the deterioration of existing wildlife habitat due to runoff, road and cabin construction, and the introduction of domestic pets. The proposal is likely to cause a change in the movement patterns of wildlife such as deer and elk due to the subject property's proximity to a wildlife migration corridor.

17. The proposal may result in the increase in the rate of use of fuel wood.

18. The proposal will increase existing noise levels due to human activity, vehicles, and generators.

19. The proposal will produce new light due to the artificial lights associated with human occupancy.

20. The proposal will result in the alteration of the present land use of the

area. The proposal is a complete change from the current use of the subject property and adjoining properties. Further, the developer indicates there will probably be future development of lands he owns to the East and North of the subject property.

21. The proposal will alter the location, distribution and density of human population in the area. The Closed Area is uninhabited except for short term or seasonal use.

22. The proposal will result in the generation of additional vehicular movement due to increased traffic on the interior and exterior access roads.

23. The proposal will result in the need for new or altered governmental services in the areas of police and fire protection. The increased fire hazard caused by human occupancy potentially

endangers the surrounding forest lands, wildlife, wildlife habitat, water quality, and cultural and historical sites.

24. The location of cabins on the property will inevitably lead to the need for increased police protection to prevent vandalism and to protect residents.

25. The proposal will result in the need for new systems for water, sewage and solid waste disposal.

26. The timber harvested from the restricted lands within the Closed Area is a major source of income for the Yakima Nation. Approximately 90 percent of the annual Tribal income is derived from the timber harvest.

27. The Closed Area is an integral part of the traditional Washat religion practiced by many tribal members in that

it provides a unique place to gather foods and herbs.

28. "Sweathouses" and other places or items of cultural or religious significance are located within the Closed Area. At least one traditionally used "sweathouse" location lies within one to two miles of the subject Brendale property.

29. The Yakima Nation is in the process of expending considerable time and money to develop an extensive big game management program within the Closed Area. Field studies are presently underway which preliminarily show that elk herds migrate through Tepee Creek drainage basin -- the location of the Brendale proposed development.

30. A major elk wintering range lies three to five miles from the Brendale property.

31. Mule deer also use the area in the vicinity of the Brendale property as a migration corridor.

32. There are no permanent residences in the Yakima County portion of the Closed Area.

33. The Closed Area of the Yakima Nation is a unique area. It has remained relatively undeveloped. Over the years its forest has provided considerable economic benefits to the tribe; its waters, wildlife, and soil have provided an abundance of food and its protected existence has kept intact the Closed Area's intangible but critical cultural values.

34. The preponderance of the evidence has convinced this court that the Closed Area is an integral part of the Yakima Indian Nation. As such, the Tribe must be able to exercise regulatory

control over the area, including the Brendale fee land. To deprive the Yakima Nation of this authority would unquestionably threaten its political integrity, its economic security and the general health and welfare of the tribe and its members.

35. Yakima County's interest in regulating the Brendale property is limited; the only interest articulated by the county was the general interest of providing regulatory functions to its taxpaying citizens. Yakima County does not contend otherwise and the court finds that the Tribe's exercise of its regulatory authority over the fee land will not have effects outside the boundaries of the reservation. In no significant way will the Tribe's regulation of Mr. Brendale's property negatively affect defendant Yakima County.

LEGAL ANALYSIS

The court's legal analysis must focus on two issues: the regulatory jurisdiction question; and, the Yakima Nation's Section 1983 claim.

A. JURISDICTION TO REGULATE LAND USE:

The resolution of the jurisdictional dispute requires a two-step analysis. The court must first decide whether the Yakima Nation has any authority to regulate the activities of Mr. Brendale on his Closed Area fee land. If the tribe does indeed have that power, then the inquiry is whether Yakima County may exercise its concurrent jurisdiction over the same property. Although the two steps are distinct, there is some overlap in the analytical framework.

1. TRIBAL AUTHORITY: The Montana Test.

Although Indian Tribes possess "attributes of sovereignty over both their members and their territory", United States v. Wheeler, 435 U.S. 313, 323 (1975), the dependent status of tribes and their diminished status as sovereigns limits their power in relations between a Tribe and nonmembers of the Tribe. Id. at 326. In fact, Indian Tribes have been divested of the power to exercise any criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S.1 191 (1978). Similarly, a Tribe's inherent power to exert civil jurisdiction over non-Indians has been diminished. While a Tribe does possess the power to "exclude nonmembers entirely or to condition their presence on the reservation", New Mexico v. Mescalero Apache Tribe, 103 S.CT. 2378, ____ (1983), apparently that power

may be exercised over non-Indian fee lands only in limited circumstances. Montana v. United States, 450 U.S. 544 (1980). Thus, in certain situations a Tribe may "exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands". Id. at 565. Unfortunately, the parameters of that power are anything but settled; nevertheless, the Court has provided guidance which is pertinent to the case at hand.

The Montana Court identified two situations in which the exercise of tribal civil jurisdiction over non-Indian fee land may be appropriate. The first instance is where a non-Indian, through a business relationship or otherwise, has entered into a "consensual relationship" with the tribe or its members. Id. at 565. Such is not the

case here as there is no evidence of any "consensual relationship" between the Yakima Nation and Brendale which would place him within the authority of the Tribe.

The second situation described by the Montana Court is where the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe." Id. at 566. Thus, absent a "consensual relationship", the critical factual determination which must be made in deciding whether a Tribe may regulate the land use of a non-Indian on fee land is whether the non-Indian's activities pose a threat to the Tribe's political integrity, its economic security or its health and welfare. Id. at 565-66; see United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) (tribe

lacked power to regulate water use of non-Indian fee landowners within the reservation); Cordin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) (building, health and safety regulations applied to nonmember business located on fee lands within the reservation), cert. denied, 459 U.S. 967 (1982); Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982) (tribal zoning ordinance applied to fee land within the reservation); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) (tribe allowed to exercise regulatory authority over water use of Non-Indian fee landowners within the reservation), cert. denied, 454 U.S. 1092 (1981); Sechrist v. Quinault Indian Nation, 9 I.L.R. 3064 (W.D. Wash. 1982); Lummi Indian Tribes v. Hallover, 9 I.L.R. 3025 (W.D. Wash. 1982).

As stated in the Findings of Fact, this court finds that Brendale's proposed development does indeed pose a threat to the political integrity, the economic security and the health and welfare of the Yakima Nation. His planned development of recreational housing places critical assets of the Closed Area in jeopardy. While the danger to the economically important timber production is significant, of paramount concern to this court is the threat to the Closed Area's cultural and spiritual values. To allow development in this unique and undeveloped area would drastically diminish those intangible values. That in turn would undoubtedly negatively affect the general health and welfare of the Yakima Nation and its members. This court must conclude therefore that the Yakima Nation may regulate the use that

Brendale makes of his fee land within the Reservation's Closed Area.

Notwithstanding the court's finding that the proposed Brendale development's threatened harm allows the Yakima Nation to exercise civil regulatory authority, the defendants argue that Congress has stripped the Tribe of any such power. Specifically, the defendants contend that when the State of Washington assumed jurisdiction over the Yakima Reservation pursuant to § 6 of the Act of August 15, 1953, 67 Stat. 590 (Public Law 280) (hereinafter P.L. 280) the Yakima Nation was divested of its inherent tribal authority to regulate the activities of non-Indians on deeded land.[6] The gist of

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[6] WASH. REV. CODE § 37.12.010 provides:

Assumption of criminal and civil jurisdiction by state. The State of Washington hereby obligates and binds

their argument is that P.L. 280 was a grant of jurisdiction to the state (and therefore the county) which necessarily must have withdrawn jurisdiction from the Tribe. This argument is without merit for several reasons.

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itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.021 [tribal consent] have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and,
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways.

To begin with, P.L. 280 neither increased nor diminished a state's authority over the reservation activities of non-Indians. In no way can it be construed as a grant of such authority -- no such grant was necessary. Under P.L. 280, states retain the same regulatory jurisdiction over the on-reservation activities of non-Indians "that they enjoyed prior to that Law". White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1279 (9th Cir.

Provided further, that Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

This partial assumption of jurisdiction over Indians (based on the status of the land on which the questioned activity occurred) has been sanctioned by the Supreme Court. Washington vs. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979).

1981). And it is settled law that long before the enactment of P.L. 280, states (and presumably a political subdivision like Yakima County) had the power to assert sovereign powers over the reservation activities of non-Indians. See, e.g., Draper v. United States, 164 U.S. 240 (1896); Utah & Northern R.R. v. Fisher, 116 U.S. 28 (1885). As discussed infra, the only limitations on that power are the independent but related barriers of "infringement on the inherent tribal sovereignty", see e.g., Williams v. Lee, 358 U.S. 217 (1959) and the doctrine of "federal preemption". See e.g., New Mexico v. Mescalero Apache Tribe, 103 S.Ct. 2378 (1983).

Further evidence that P.L. 280 did not in any way affect the powers of a state over non-Indians is the law's

purpose. P.L. 280 was designed to remedy the problem of the lack of state jurisdiction over Indians in their dealings (criminal or civil) with non-Indians. See Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U.C.L.A. Law Rev. 535 (1975). The states needed Congressional authorization to exert power over Indians. No such authorization was needed, however, as to the states' authority over non-Indians. Thus, P.L. 280 was not a grant to the states of jurisdictional powers over non-Indians. Accordingly, it cannot be construed as supplanting the tribe's authority with state authority[7] or

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[7] Even if P.L. 280 were interpreted as an affirmation or expansion of the state's jurisdiction over non-Indians, it is limited to "civil litigation" and not "general state civil regulatory control" such as zoning. See Bryan v. Itasca County, 426 U.S. 373, 384-85 (1976);

divesting the tribe of whatever inherent power it has over the reservation activities of non-Indians. See Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), cert. denied, 103 S.Ct. 293 (1983); Sechrist v. Quinault Indian Nation, I.L.R. 3064 (W.D. Wash. 1982).[8]

Barona Group of Captain Grande Band v. Duffy, 694 F.2d 1185, 1188 (9th Cir. 1982) (P.L. 280, does not enable California to impose its regulatory bingo laws on the reservation); United States v. City of Humboldt, 615 F.2d 1260 (9th Cir. 1980) (California municipality may not zone restricted lands); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1976) (California county may not zone restricted lands).

[8] Both cited cases upheld the Quinault Indian Nation's application of its zoning laws to non-Indian owned deeded lands. The State of Washington exercises the same degree of P.L. 280 jurisdiction over the Quinault Indian Reservation as it does over the Yakima Reservation. See, Comenout v. Burdman, 84 Wn.2d 192 (1974). Implicitly then, these two cases must be interpreted as rejecting the notion that P.L. 280 stripped tribes of their civil jurisdictional authority.

2. YAKIMA COUNTY AUTHORITY: Preemption.

Having concluded that the Yakima Nation may exercise its regulatory authority over the Brendale property, the court's inquiry must now focus on whether Yakima County may also exert its authority over the same property, i.e. whether Yakima County may exercise concurrent jurisdiction. While it is unquestioned that Yakima County has the authority to exercise jurisdiction over non-Indian activities on the Reservation, see e.g., New Mexico v. Mescalero Apache Tribe, 103 S.Ct. 2378 (1983); Colville Confederated Tribes v. Walton, 674 F.2d 42, 51-53 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981), that power is not boundless. It is limited by the twin barriers of "infringement on tribal

sovereignty"[9] and "federal preemption".[10] Although related in concept, these twin barriers are independent and either standing alone may be sufficient to block the county's attempt to assert its power. White Mountain Apache Tribe v. Bracker, 448 U.S. at 142. In other words, Yakima

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[9] The "infringement" barrier has as its foundation the right of a tribe to exercise traditional governmental functions. The exercise of state authority may be barred if it "unlawfully infringes 'on the right of Indians to make their own laws and be ruled by them'." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980), quoting Williams v. Lee, 358 U.S. 217, 220 (1959).

[10] The preemption barrier, on the other hand, is based upon the federal supremacy clause and the federal government's plenary power over Indian Tribes. See, e.g., Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982); Central Machinery Co. v. Arizona Tax Comm'n., 448 U.S. 160 (1980).

County may extend its regulatory authority onto the Yakima Nation Reservation up to the point where it either infringes on the Tribe's inherent authority or where it is preempted by federal law. In this case, where the county seeks to regulate the activities of non-Indians on fee land, the inquiry must focus on the preemption barrier.[11]

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[11] Since the infringement barrier is derived from the right of tribal self-government, it is primarily applicable where intratribal relations are implicated. White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1275 (9th Cir. 1981). Yakima County's Regulation of Mr. Brendale's property does not violate the right of tribal self-government. Concurrent jurisdiction over Brendale's property would require him to comply with the regulations of Yakima County and the Yakima Nation. Thus, Yakima County would not be infringing on the Yakima Nation's right to "make their own laws and be ruled by them." See Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (state taxation of on-reservation cigarette purchases does not intrude upon or diminish the tribe's authority to also

When used in the context of Indian law, the doctrine of preemption is applied uniquely. Due to the "historical origins of tribal sovereignty" and the federal commitment to tribal self-sufficiency and self-determination it is "treacherous to impart . . . notions of preemption that are properly applied to other contexts." Bracker, 448 U.S. at 143. Unlike preemption in other contexts, Indian law preemption does not require "an express congressional statement to that effect," Id. at 144, nor does it even require "a narrow focus on congressional intent to preempt state

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tax); White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1285 (9th Cir. 1981) (state hunting and fishing regulations may be applied to non-Indians on reservations without violating the right of tribal self-government).

law". New Mexico v. Mescalero Apache Tribe, 103 S.Ct. at 2386. Rather, "state [county] jurisdiction is preempted by federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state [county] interests at stake are sufficient to justify the assertion of state [county] authority." Id. at 2386. In other words, a preemption analysis rests principally on a consideration and balancing of the competing federal, county and tribal interests at stake. Id. at 2386.

Federal and tribal interests are assessed from a broad perspective. Traditional notions of Indian sovereignty and the federal government's commitment to the promotion and protection of tribal resources and cultural values are consi-

derations which must be weighed on the preemption scales. E.g., New Mexico v. Mescalero Apache Tribe, 103 S.Ct. at 2386-2387; Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982). On the other hand, an assessment of the county's interest is guided by more narrow and specific considerations. The concept of county sovereignty and general county governmental interests are of limited importance. See, e.g., Warren Trading Post Co. v. Arizona Tax Comm'n., 380 U.S. 685 (1969). Yet, a state's [county's] regulatory interest will be particularly substantial if the state can point to off-reservation effects that necessitate state [county] intervention." New Mexico v. Mescalero Apache Tribe, 103 S.Ct. at 2387; Colville Confederated Tribes v. Walton, 647 F.2d at 52-53.

As stated in this court's Findings of Fact, Yakima County's interest in regulating the at-issue Brendale property is minimal. Yakima County conceded that its interest was limited to a general concern of providing regulatory functions to its tax paying citizens. Furthermore, the county did not point to any "off-reservation effects" which the Tribe's regulation of Brendale's property would produce. To the contrary, the county agreed, and this court so finds, that the Tribe's exercise of its regulatory authority over the fee land will not produce effects outside the Reservation boundary. In sum, the court concludes that Yakima County's interests tip the preemption scales only slightly.

On the other hand, the interests of the Yakima Nation weigh heavily on the preemption scales. The Closed Area

provides immense benefit to the Yakima Nation. It's timber produces substantial tribal income; its flora and fauna provide a ready source of subsistence; its sacred areas help sustain the spiritual needs of the tribal members; and its beauty most certainly contributes to the general health and welfare of the Tribe. Those resource and cultural values carry great weight. And, given the unique character of the Closed Area, it is imperative that the Yakima Nation be able to exercise complete control over its use. Accordingly, the court concludes that the interests of the Yakima Nation in exerting its authority over the Brendale property far outweighs the interests of Yakima County; thus Yakima County is preempted from exercising concurrent jurisdiction and the Yakima

Nation's jurisdiction over Brendale's property is exclusive.

B. SECTION 1983 CLAIM:[12]

The bases for the Yakima Nation's civil rights claim are twofold. First, the Tribe asserts that the County Commissioners denied it due process of law by not providing the Tribe a meaningful opportunity to be heard on the jurisdictional issue. Second, the Tribe argues that Yakima County's attempts to exercise jurisdiction over the Brendale property violated rights enforceable

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[12] 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

under Section 1983. For the reasons discussed below, the court concludes that neither of these two alleged bases of Section 1983 liability has merit.

Assuming that the Yakima Nation is a proper plaintiff in a Section 1983 action,[13] the court finds that it was not denied due process of law by the Yakima County Commissioners. The purpose of the hearings conducted on August 1, 2, 8 and 9, 1983 was to hear the Tribe's appeal of

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[13] The parties have expended considerable effort in debating whether an Indian Tribe such as the Yakima Nation may bring a Section 1983 action. The resolution of that issue turns on whether the Tribe is "any citizen of the United States or other person within the jurisdiction thereof. . . . " 42 U.S.C. § 1983 (emphasis added). Neither the court nor the litigants have located any legal precedent which directly addresses that issue. It is not, however, necessary to answer that novel question since the court concludes that the Yakima Nation has not been deprived of "any rights, privileges, or immunities secured by the Constitution and laws . . . ." Id.

The Planning Department's Declaration of Non-Significance. The hearing was statutorily mandated to provide the Tribe with the opportunity to convince the Commissioners that the Planning Department had erred and show that Brendale's proposed development warranted the preparation of an Environmental Impact Statement -- which the Tribe succeeded in doing. The hearing was neither designed as a forum to contest jurisdiction nor was it an appropriate forum for such a debate. As demonstrated by the complexity of this lawsuit and the cases cited in this opinion, Indian reservation jurisdictional disputes are not easily resolved. It is unrealistic for the Yakima Nation to expect and even demand that it be given free reign at the administrative podium to argue and present evidence pertaining to the issue

of jurisdiction, particularly when the Commissioner's sole function was to determine whether an EIS was warranted. The Commissioner's decision to allow the Yakima Nation to state its objections to the county's jurisdiction over the Brendale property and then going forward with the appeal hearing was the proper course of action. The Tribe suffered no infringement on its rights to due process of law. See generally Mathews v. Eldridge, 424 U.S. 319 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Goldberg v. Kelly, 397 U.S. 254 (1970).

While the Tribe's first basis for its Section 1983 claim must fail because no due process deprivation occurred, the Tribe's second ground for relief fails because it involves a "right" which is not within the scope of Section 1983 relief. Based upon this court's conclu-

sion that Yakima County is preempted from exerting its land use authority over the Brendale property, there can be little argument that its attempts to do so were unlawful. It can be said, therefore, that the Yakima Nation has a "right" to be free from such unlawful action. Nevertheless, not all federally created rights are "enforceable" under Section 1983. See generally, Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981); Maine v. Thiboutot, 448 U.S. 1 (1980).

The Tribe's "right" to be free from the county's concurrent jurisdiction is derived from the doctrine of federal preemption. But for the operation of that doctrine, the Yakima Nation would be powerless to interfere with the county's

authority. As mentioned previously, the source of preemption as applied in Indian law cases is the federal government's plenary power over Indian Tribes and the Supremacy Clause, U.S. Const. Art. VI, § 2. See e.g., Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982); Central Machinery Co. v. Arizona Tax Comm'n., 448 U.S. 160 (1980). Of course, "traditional notions of Indian self-government" provide an important "backdrop" which color the preemption doctrine. McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 172 (1973).

The Supreme Court has held that a Supremacy Clause violation does not give rise to Section 1983 relief. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 615 (1979). Mere incompatibility between federal and state (local) laws "does not, in itself, give rise to a

claim 'secured by the Constitution.'" Id. The portion of the Civil Rights Act of 1871 now codified as Section 1983 was directed at organized terrorism and the unwillingness or inability of state officials to control the widespread violence. Id. at 610 n.25. Thus, Section 1983 is concerned with the relationship between individuals and the state in matters involving life, liberty or property. It was not intended to apply to the distribution of allocation of power between a state and the federal or tribal government. See id. at 615; Consolidated Freightways Corp. of Delaware v. Kassel, 730 F.2d 1139 (8th Cir. 1984) (violation of Federal Commerce Clause does not secure rights within the meaning of Section 1983) cert. denied, 105 S.Ct. 126 (1984). In order to be entitled to relief under Section 1983,

the Yakima Nation must rely on some enforceable right beyond its Supremacy Clause-derived "right" to preempt conflicting County regulations. Thus, the court concludes that the plaintiff has not stated a Section 1983 claim and is therefore not entitled to attorney's fees under Section 1988.[14]

ATTORNEY FEES

Based upon the dismissal of the Section 1983 claims against them, defendants Glaspey and Brendale have

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[14] 42 U.S.C. § 1988 provides:

In any action or proceeding to enforce a provision of sections 1981, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

filed petitions for attorney fees as "prevailing" parties.[15] 42 U.S.C. § 1988. A prevailing defendant in a Section 1983 case may recover attorney fees "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." Hensley v. Eckerhart, 103 S.Ct. 1933, 1937 n.2 1983; Boatowners and Tenants Association v. Port of Seattle, 716 F.2d 669 (9th Cir. 1983). The court finds that none of those prerequisites to fees exists in this case.

There is no contention that plaintiff's Section 1983 claims against these two defendants was vexatious or brought

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[15] During the trial the court dismissed all of plaintiff's claims against Glaspey. At the conclusion of the trial the court dismissed plaintiff's Section 1983 claim against Brendale, finding that Brendale had not acted "under color" of state law. 42 U.S.C. § 1983.

to embarrass them. The defendants do, however, argue that the Section 1983 claims against them were frivolous. Glaspey contends that the action was frivolous as to him because he had no ownership interest in the Brendale property. While the court does agree that the plaintiff should have extensively investigated the surrounding facts to ascertain the identity of the necessary party defendants, see Fed.R.Civ.P. 11, the court is unable to conclude that the inclusion of Frank Glaspey was frivolous.

Defendant Brendale asserts that the suit against him was frivolous as there was no evidence that he acted "under color" of state law. Notwithstanding the court's dismissal of the Section 1983 claim on those grounds, the plaintiff's claim was not frivolous. The caselaw

construing the "under color" of law language demonstrates that the application of that phrase is anything but precise. See e.g., Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983); Fonda v. Gray, 707 F.2d 435 (9th Cir. 1983); Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983); Arnold v. International Business Machines, 637 F.2d 1350 (9th Cir. 1981). The courts' difficulty in establishing definitional parameters has resulted in almost a case-by-case analysis. For that reason, it was not unreasonable or frivolous for the plaintiff to assert that Brendale was acting "under color" of law when he sought Yakima County approval of his proposed development.

CONCLUSION

Based upon the above Findings of Fact and legal conclusions, judgment shall be entered in favor of the plain-

tiff as against all defendants (except Frank Glaspey) to the following intent: The court declares that the Yakima Indian Nation has exclusive regulatory jurisdiction over the land use of the Brendale property described on page 12 of this memorandum opinion.

As to plaintiff's 42 U.S.C.§ 1983 claims, judgment shall be entered in favor of defendants Jim Whiteside, Graham Tollefson, Charles Klarich, Richard Anderwald, Philip Brendale and Frank Glaspey.

Plaintiff's 42 U.S.C. § 1983 claims are DISMISSED WITH PREJUDICE.

All parties shall bear their own attorney fees.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 10th day of September, 1985.

/s/
JUSTIN L. QUACKENBUSH
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

YAKIMA INDIAN NATION,	)	
Plaintiff,	)	JUDGMENT IN A CIVIL CASE
vs.	)	CASE NUMBER: C-83-604-JLQ
WHITESIDE, et al.,	)	
Defendants.	)	

/_7 Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has tendered its verdict.

/_X/ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff against all defendants (except Frank Glaspey) to the following extent: The court declares that the Yakima Indian Nation has exclusive regulatory juris-

diction over the land use of the Brendale property described on page 12 of the foregoing Memorandum Opinion. As to plaintiff's 42 USC 1983 claims, judgment is entered in favor of Defendants Jim Whiteside, Graham Tollefson, Charles Klarich, Richard Anderwald, Philip Brendale and Frank Glaspey.

Plaintiff's 42 USC 1983 claims are dismissed with prejudice.

All parties shall bear their own attorney fees.

September 11, 1985 /s/ J. R. Fallquist
Date Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,	)	
Plaintiff,	)	NO. C-83-604-JLQ
vs.	)	ORDER DENYING DEFENDANT BRENDALE'S AMENDED MOTION FOR RECONSIDERATION
JIM WHITESIDE, GRAHAM TOLLEFSON, CHARLES KLARICH, RICHARD ANDERWALD, PHILIP BRENDALE and FRANK GLASPEY,	)	
Defendants.	)	

THIS ORDER shall serve to memorialize the court's oral ruling of October 21, 1985, denying defendant Brendale's Amended Motion for Reconsideration which the court construed as a timely request to alter or amend the judgment under Rule 59(e), Fed.R.Civ.P. The affidavit, Ct. Rec. 143, submitted with defendant's motion was insufficient to demonstrate that the court's findings

regarding cultural activities in the "closed area" should be altered.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 5th day of November, 1985.

/s/
JUSTIN L. QUACKENBUSH,
United States District
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,	)	
Plaintiff,	)	NO. C-83-604-JLQ
vs.	)	ORDER DENYING DEFENDANT BRENDALE'S MOTION UNDER RULE 60(b) FED.R.CIV.P.
JIM WHITESIDE, GRAHAM TOLLEFSON, CHARLES KLARICH, RICHARD ANDERWALD, PHILLIP BRENDALE & FRANK GLASPEY,	)	
Defendants.	)	

THIS ORDER shall serve to memorialize the court's oral ruling of November 18, 1985, denying defendant Brendale's motion under Rule 60(b) Fed.R.Civ.P., by which pleading movant appears to seek a new trial, amended rulings, or reconsideration of the court's Order dated November 5, 1985, denying defendant Brendale's Amended Motion for Reconsideration which was

construed as a Motion to Amend Judgment under Rule 59(e), Fed.R.Civ.P.

As stated at oral argument, if the motion is to be construed as brought under Rule 60(b)(2), Fed.R.Civ.P., which permits reopening of the action based upon "newly discovered evidence," movant must demonstrate excusable ignorance or due diligence to justify the failure to introduce the evidence earlier during this action. Affiant Yahyowan was aware at the time of trial of the facts which are set forth in his affidavit. Affiant Brendale's affidavit and the other documents of record are insufficient to demonstrate that movant acted with due diligence to acquire knowledge of the facts possessed by Officer Yahyowan. Similarly, defendant's motion is not properly resolved under Rule 60(b)(6), Fed.R.Civ.P. since this is not a case of

"exceptional" circumstances. Waggoner v. McGray, Inc., 743 F.2d 643 (9th Cir. 1984). Lastly, Officer Yahyowan's testimony would not have been sufficient to persuade the court that its findings and conclusions were incorrect.

Accordingly, the motion is DENIED.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 19th day of November, 1985.

/s/
JUSTIN L. QUACKENBUSH
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION	)	
Plaintiff,	)	NO. C-83-724-JLQ
vs.	)	May 24, 1984 Yakima, Washington 2:45 o'clock, P.M.
COUNTY OF YAKIMA, JIM WHITESIDE, GRAHAM TOLLEFSON, CHARLES KLARICH, RICHARD F. ANDERWALD, STANLEY WILKINSON, JIM GATLIFF and DICK KELLER,	)	
Defendants.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

BEFORE THE HONORABLE
JUSTIN L. QUACKENBUSH, Judge.

ENTERED this 8th day of June, 1984.

/s/
JUSTIN L. QUACKENBUSH,
United States District Judge.

THE COURT: This case, of course, is a companion case to the so-called Whiteside I case, which is Cause No.

C-83-604-JLQ, Whiteside I being a case recently decided by this Court, by this Judge, involving the Closed Area of the Yakima Indian Reservation. For reasons which I stated in my Oral Opinion in Whiteside I, and for other reasons stated in my soon-to-be filed written Opinion in Whiteside I, I determined that Yakima County was without jurisdiction to impose its zoning code on deeded land within the Closed Area portion of the Yakima Indian Reservation.

While this case also involves land within the exterior boundaries of the Yakima Indian Reservation, the factual circumstances in the two cases are strikingly distinct. They are as different, in my opinion, as night and day. I will explain those distinctions somewhat in this Opinion.

In the Closed Area, as referred to in Whiteside I, the Closed Area encompasses some 870,000 acres of land. Approximately 740,000 acres of land in the Closed Area was within Yakima County. Only some 25,000 acres, or approximately three percent of that total land, was deeded land which was held in trust. Most of that three percent, or that relatively miniscule 25,000 acres, was owned and is owned by a timber company. Very few, if any, permanent residents reside in the Closed Area, and it is my recollection from the testimony that no non-Indians were permanant residents of the Closed Area.

Contrasting those circumstances, in the Closed Area is the completely different geographic and demographic facts that apply and exist in the so-

called Open Area, and I am, once again, referring to the Open Area as being that portion of the Yakima Indian Reservation not included in the Closed Area as it was defined for me and to me during the trial of Whiteside I.

While the total acreage in the Closed Area really isn't clear, and very frankly, Mr. Hovis, I want to say that the acreage total that Mrs. Hill had from the computer, and I'm not saying Mrs. Hill made an error, I'm very frankly troubled by computer statistics, it would appear to me from the statistics furnished me in Whiteside I that the total acreage in the Open Area is some 350,000 acres. Whatever the acreage is, a substantial portion of the land within the Open Area is deeded non-trust land.

I surmise that if one were to utilize the yellow area suggested by Mr.

Sullivan in his argument from Exhibit No. 250, one could well find that the non-trust ownership within that yellow area would approach some fifty percent, or some figure close thereto.

The population statistics are completely different between the Closed Area and the Open Area. I don't recall that there were population statistics furnished in Whiteside I. It may well be there weren't any furnished because there weren't any permanent residents. As I have indicated earlier, it is my recollection from Whiteside I that there were very few, if any, permanent residents in the Closed Area or portion of the reservation.

In contrast to those figures, in the Open Area, an area that would appear to be about half the size of the Closed Area, I find that there were some 25,000

residents of whom approximately 5,000 or one-fifth are Indians, or some twenty percent, the other eighty percent being non-Indians.

Within the Open Area of the reservation are three incorporated cities: Toppenish, Washington, with a population of 6,575; Wapato, Washington, with a population of 3,310, and Harrah, Washington, with a population of 345. So, as I have indicated, the demography of the area is different, the population is different, and the size of the area is different.

The Closed Area is primarily forest land, which forest land is responsible for producing, as I recall, approximately ninety percent of the Yakima Indian Nation's annual income. Contrasted with that is the use made of the Open Area,

which is primarily and predominantly agricultural.

I find that the county has exercised zoning jurisdiction on deeded land in the Open Area for the past thirty-five years. Other than the issues raised in this case, the Wilkinson Plat, and with one other possible exception which I believe was the blood plant down around Toppenish, it appears that the Yakima Indian Nation has not legally contested the county's jurisdiction to zone non-trust, deeded lands within the Open Area of the Yakima Indian Reservation.

There, likewise, are substantial differences, in my opinion and I so find, between the county's interest in the Closed Area and the county's interest in the Open Area. I found in Whiteside I, the Closed Area case, that there really were no interests that the county had in

attempting to authorize Mr. Brendale to build a residential development in the middle of the Closed Area. For that reason, I further found that the county was preempted from attempting to impose its zoning code even over deeded land owned by non-Indians in the Closed Area.

Contrasting those circumstances or lack thereof as to the Closed Area, in the Open Area the county's presence and interest are obvious. The county has built and maintained 487 miles of road, some 240 miles of which are hard-surfaced. The great majority, approximately eighty percent, of the residents in the Open Area are non-Indians. The county has continuously applied its comprehensive zoning plans, zoning code, and sub-area plans on the deed land in the Open Area.

I further find that the county's interest is evidenced by the county's Shoreline Management Program, which is required by state law, and which is applied by the county on Ahtanum Creek and on the Yakima River. The county's presence is further evidenced as is the county's interest by its participation in the Flood Hazard Program, which enables a resident in the Closed Area to participate in the Federal Flood Insurance Program.

The evidence further indicates that all but some one hundred children, the one hundred being Indian children who attend an Indian school, but the evidence indicates that the remainder of the children, both Indian and non-Indian, attend schools that are public schools rather than being operated by the Yakima Indian Nation.

Those are examples of the interest of the county in maintaining its presence in the Open Area of the Yakima Indian Reservation. I find that this county presence does not burden the Tribe or the Tribal Members per se.

During Mr. Hovis' argument on the Rule 41(b) Motion yesterday, I discussed with Mr. Hovis the history of the dealings by the United States' Government with the Indian Tribe. Setting aside the question of whether or not the treaties were fair and whether they were executed under duress, the conduct of the United States' Government in honoring treaties is not one that would make any person proud thereof. We, citizens of this country, and those of us particularly who are involved in its legal system take great pride in the sanctity of contract. That sanctity of contract apparently was

subjugated by the feeling of the United States' Government and its leaders, at least in the 1880's, that the United States' Government was in the role of a conquerer who, at its will, could modify the terms of an agreement reached by alleged good faith negotiations between sovereign nations and its people. That, however, is not a matter that I have the power to rectify. That is a matter for congressional enactment, for the Legislative Branch to rectify if they determine that appropriate action should be taken.

The relationship between the United States' Government and the Tribes has come full circle. From the time of the Treaty, a philosophy of assimilation was adopted as was evidenced by the Dawes Act and the General Allotment Acts in the 1880's where despite the treaties, the

government of this country decided that they would issue patents to individual Indians over portions of the reserved reservations, and if all of the land was not issued under eighty acres, as I recall, patents, then the reservations, despite the treaties, would be opened up for homesteading and allotment to White Men. That is the history; that happened.

From that time, assimilation or an assimilist philosophy existed to the point not too many years ago, I believe in the early '60's and late '50's, when the philosophy was one of termination; to-wit, terminate the reservations, pay the Indians, the Members of the Yakima Indian Nation or other Indian Nations, the fair market value allegedly of their lands, terminate their dependent status and assimilate those individuals into the main stream of the dominant people.

Now, I believe, we have come full circle to the philosophy of sovereignty once again existing, or at least a recognition that the Indian Nations have retained some inherent sovereignty. But, the history of the conduct of by the United States' Government is clearly evidenced by Exhibit No. 200. Exhibit No. 200 reflects exactly the history of the dealings by the United States' Government with the Indian people, the result being the factual situation with whim I must deal; to-wit, a substantial portion of the Open Area of the Yakima Indian Nation being held in fee rather than being held in trust for the benefit of the peoples of the Yakima Indian Nation as was intended in the Treaty of 1855.

The witnesses who testified for the Nation have impressed me with their

sincerity. They are absolutely and unequivocally sincere and honest in their beliefs that they are, in fact, as I believe Commissioner Tollefson suggested, stewards of the land, a philosophy somewhat different than those who have the commodity philosophy as suggested by Commissioner Tollefson. But I must resolve this matter not on the basis of what I think is fair; I am bound by the rule of law.

The Yakima Indian Nation, I believe, as part of their stewardship philosophy, adopted a zoning code for all of the land within the exterior boundaries of the reservation. The primary goal of that code was to preserve the agricultural land in the open space area. I find that the goals of Yakima County are the same. I do not feel it is necessary for me, nor appropriate for me, to determine which

code is better structured to attain the goals. My finding that they have common goals I believe is sufficient to be the basis for my determination in this case.

The two codes, the two philosophies of the Yakima Indian Nation and Yakima County are, in my opinion, consistent in policy and purpose. For the reasons which I have previously stated in my decision in Whiteside I, I find that Public Law 280 did not give the county exclusive zoning jurisdiction over deeded land within the exterior boundaries of the Yakima Indian Reservation. In my opinion, this case must be decided under the guidelines and following the teachings of Montana v. United States.

Montana v. United States, 450 U.S. 544, a 1980 decision of the United States Supreme Court, establishes the general principles which I feel control in this

case. The bottom line, of course, is that which we have discussed throughout Whiteside II. While an Indian Tribe cannot exercise power which is inconsistent with their diminished status as sovereigns, on the other hand, a Tribe may and does retain the inherent power to exercise civil authority over the conduct of non-Indians on those non-Indian's fee lands within the exterior boundaries of the reservation when that non-Indian's conduct threatens or has some direct affect on the political integrity, the economic security, or the health or welfare of the Tribe. In making those determinations, I am bound by the fact that the inherent sovereignty retained by an Indian Nation, in this case the Yakima Indian Nation, is not unequivocal or unrestricted.

In United States v. Wheeler, 435 U.S. 313, the Court noted that Indian Tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." That is the philosophy that was utilized in my opinion in Whiteside I. However, the Wheeler Court pointed out that despite those inherent attributes of sovereignty, "the Indians have lost many of the attributes of sovereignty." The Wheeler Court pointed out that there are certain areas where, "implicit divesture of sovereignty has been held to have occurred," as to the Tribe, and those include, "the relations between the Indian Tribe and non-members of the Tribe." The Wheeler Court pointed out that limitations upon the Tribe's sovereignty rests on the fact that there is a dependent

status of Indian tribes, and that that dependent status is necessarily inconsistent with the right of the Tribe to determine their external relations as opposed to the right of the Tribe to have its self-government, as has been pointed out to this Court by Mr. Hovis. That, of course, involves the relations of the Members of the Tribe among themselves.

In utilizing the Montana standards, I am not unmoved by the desire of the Tribe and the Members thereof to have its treaty lands returned to it, but that does not, in my opinion, justify my finding that such a desire constitutes a threat to the political integrity, the economic security, or the health or welfare of the Tribe and its Members.

The argument has been made that checkerboard zoning is either impossible or difficult to administer. I don't find

that from the evidence. I find that of necessity, so-called checkerboard zoning or appropriate multi-jurisdiction zoning is required in today's society, whether it be in the relations between counties and cities or towns, or between counties and Indian Tribes.

As is pointed out in the majority Opinion in the State of Washington v. The Confederated Bands and Tribes of the Yakima Indian Reservation, a case that counsel in this case argued before the United States Supreme Court, the lines that were drawn as a result of Public Law 280 may be difficult to administer, and there may be difficulties existing in the administration of the zoning code over the deeded land in this case, but the Yakima Indian Nation Court, the majority in the case, indicated that such classi-

fications tend to pervade the law of Indian jurisdiction.

The Washington v. Yakima Indian Nation Court further found that checkerboard jurisdiction is not novel in Indian law and does not as such violate the Constitution. I recognize that that is an analysis on a Constitutional basis as opposed to the Moe case that I discussed with counsel during the argument on the Motion to Dismiss.

I am unable to find that the desire, the sincere desire of the Tribe and its Members to have the deeded land restored to it is such as interferes with the political integrity, the economic security, or the health or welfare of the Tribe and its Members. Once again, that is a matter for the Legislative Branch, not the Judicial Branch to determine.

By reason of those findings, I find that there is no evidence whatsoever presented in this case to be the basis for a finding that the exercise by Yakima County of its zoning jurisdiction over the deeded land in the Open Area would interfere with the political integrity, economic security, or health or welfare of the Tribe.

I am satisfied, even though the Tribe in this case feels that the Wilkinson Zone change may have been inappropriate, I am satisfied that the three members of the Yakima County Board of County Commissioners will give just and due consideration to the views of the Tribe and the Tribal Members in making its zoning decisions by reason of my findings which I have just made. I find that, in fact, Yakima County does have the exclusive jurisdiction over the

zoning of the deeded land within the Open Area of the Yakima Indian Reservation.

I was impressed with the testimony of Commissioner Tollefson, and I assume that he represents the philosophy of the Board of County Commissioners. He is sensitive, in my opinion, to the views of the Members of the Yakima Indian Nation. I believe that the Board of County Commissioners and their agents, the Planning Director, Mr. Anderwald, are of a cooperative viewpoint. I sincerely believe that despite this Court's decision today, that Yakima County and the planning staff of Yakima County will give proper consideration to the viewpoints and the desires and goals of the Yakima Indian Nation as to the Open Area.

Zoning in and of itself is one of the most controversial things, I think Mr. Hovis spoke to this, and any of us

who dealt in such matters through our legal careers recognize it as one of the most difficult areas of the law. Competing viewpoints always surface. One cannot but help to give due respect to county commissioners who are called upon to make many decisions, but the most difficult decisions in my experience are those involving zoning matters.

I suggest to the Yakima Indian Nation that despite your sincere belief that all of the land within the exterior boundaries should be returned in accordance with the Treaty of 1855, that that may be some time in coming. I think you recognize that that is a matter for the Legislative Branch of this Government to decide; to-wit, Congress. It involves funding and the competing interests for funding, and that inherent and sincere desire which you have should burn

brightly in my opinion. But, while you should and will, I'm sure, retain that deep sense of commitment to accomplishing that end, in my judgment during the interim period, however long it may take, I would suggest to you that it is in the best interests of the Tribe in retaining that basic nature of the land that is the subject of this suit. It is in your best interests to participate and make your views known at any time a proposal comes to your attention that may be in any manner inconsistent with your truly held and firm beliefs.

Finally, that brings me to the challenge of the procedural aspect. I find that minimal due process is present in the notice operations and notice procedures followed by Yakima County in the giving of a notice to the appropriate planning agency of the Yakima Indian

Nation. I think it is clear from the evidence that Yakima County does not have access to the true ownership rolls of trust property; the Yakima Indian Nation does, and it would seem to be appropriate in my opinion to have the Yakima Indian Nation then furnish the further notification to those fractionated property owners as to any parcel that is being subjected to jurisdiction by Yakima County.

Having determined that Yakima County does, in fact, have exclusive jurisdiction over the deeded land in the Open Area, it remains, of course, for the Court to consider the pendent claim under SEPA. I very seriously question whether it is appropriate for Federal Court to make a state court judgment, what I think should be a state court decision, on whether or not a county has complied with

state laws. It is, of course, permitted for a Federal Judge to make that determination under the doctrine of pendent jurisdiction, which has been invoked in this case.

The trial briefs submitted to me have not addressed the SEPA claim, the pendent claim, I believe because it was recognized that the principal issue would be determined before the SEPA issue would be addressed. But, I assume now it would be appropriate to have a briefing period to address the SEPA claim.

How much time would you want on that, Mr. Hovis? As I read the Washington law and from my own experience, the matter is determined on the record.

MR. HOVIS: That's correct, your Honor. I'd like to have some time, your Honor, because of the press of other

business, and I would like to have as much time as I can have. If I could have thirty days to get my brief in, I would appreciate it.

THE COURT: All right. I will permit that.

Counsel, I intend to sign the final orders in Whiteside I and Whiteside II on the same day; I think that is appropriate in case you wish to have the matter reviewed. Clearly, my findings are binding, as you recognize, on any appellate court, but there is, as Mr. Sullivan has clearly pointed out in his strenuous argument, the Public Law 280 argument, and I'm sure you'll have the countervailing arguments in Whiteside II, but I think it is appropriate that I sign the final order on -- even though I've decided these two cases now -- the final order that would start the time running

on any appellate process on the same day, because I'm sure that these may well be cases --

MR. HOVIS: It would be well to be consolidated at least on the appeal basis for argument, your Honor.

THE COURT: We still have open the 1983 issue, at least as to attorney's fees in Whiteside I. I don't know what may be coming from the county as to the 1988 claim in Whiteside II, but I think it is appropriate that all these matters be finalized in one day.

I'll allow you thirty days, Mr. Hovis, and fifteen days to respond, because I'm sure you have addressed these matters before, Mr. Sullivan and Mr. Austin. You probably have your brief bank well prepared.

Are there any other matters that need to be decided today, or scheduling on these matters?

MR. HOVIS: I can't see any, your Honor.

THE COURT: Mr. Sullivan?

MR. SULLIVAN: I don't believe so, your Honor.

THE COURT: I want to compliment counsel. It's a real pleasure to try a case as difficult as this one is with the two experts, in my judgment, in the field of Indian law on these subjects; two attorneys who have had much, if not more experience in Indian law cases of any still practicing today. I'm not trying to date either one of you gentlemen, but I do appreciate the job that's been done. It makes it enjoyable to try such cases, even though the decisions in these two cases were difficult, and I appreciate

the job that you have done in these cases.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

YAKIMA INDIAN NATION,	)	
Plaintiff,	)	NO. C-83-724-JLQ
vs.	)	MEMORANDUM OPINION
WHITESIDE, et al.	)	
Defendants.	)	

The Yakima Indian Nation (Yakima Nation) brought this suit seeking a declaratory judgment and injunction barring the defendants from taking or permitting any land use within the so-called "Open Area" of the Yakima Indian Reservation (Reservation) which is contrary to the Amended Zoning Regulations of the Yakima Nation (Yakima Nation Code). The named defendants are the Yakima County Commissioners; and Stanley Wilkinson, record owner of fee land

within the "Open Area."[1] Specifically, the plaintiff seeks to impose its zoning and land use law on a 32 acre parcel of land owned by defendant Wilkinson. Additionally, the Yakima Nation asks the court to limit Yakima County's regulatory authority over this property to the extent that the County's laws would allow land uses inconsistent with those permitted by the plaintiff. In other words, the plaintiff seeks a judicial declaration that its regulatory jurisdiction over Wilkinson's property is paramount and exclusive.

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1 In addition to those defendants, the complaint also named Jim Gatliff and Dick Keller, prospective purchasers of some of the at-issue property. By oral ruling on May 23, 1984 the court, pursuant to Fed.R.Civ.P. 41(b), rendered judgment in favor of defendants Gatliff and Keller.

The plaintiff's complaint also contains allegations of civil rights deprivations. More particularly, the Yakima Nation contends that the County's assertion of its zoning jurisdiction over the Wilkinson property violated Section 1 of the Civil Rights Act of 1971. (Codified at 28 U.S.C. § 1983).

Following a four day bench trial the court entered an oral decision favorable to the defendants. (Ct. Rec. 81).[2] What follows is the court's written opinion including its Findings of Fact and Conclusions of Law. This written opinion shall supplement the court's oral opinion.

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[2] The court's oral decision encompassed only the plaintiff's request for a declaratory judgment on the regulatory jurisdiction issue. The Yakima Nation's Section 1983 claim and pendent state claim were expressly excluded from the oral decision but are addressed in this written opinion.

FACTUAL BACKGROUND

The Yakima Indian Nation is a composit of fourteen (14) originally distinct Indian tribes who banded together in the mid-1900's for the purpose of negotiating with the United States. Pursuant to a treaty signed in 1855 and ratified in 1869, 12 Stat. 951, these various tribes ceded vast areas of land but also reserved an area for their "exclusive use and benefit". This reserved area is the Yakima Nation Indian Reservation (Reservation).

The Reservation is located in south-eastern Washington. It's exterior boundary encompasses approximately 1.3 million acres of land. Of this amount, about eighty percent of the land is held in trust by the United States for the benefit of the Tribe or its individual

members (trust lands). The remaining land is held in fee by Indians or non-Indian owners (fee land). The majority of the fee land lies within the three incorporated towns in the northeastern part of the reservation -- Toppenish, Wapato and Harrah. The remainder is scattered throughout the reservation creating the now familiar "checkerboard" effect. The fee lands fall within the boundaries of Klickitat, Lewis and Yakima Counties.

Most of the trust land lies within the Reservation's "Closed Area", an area accessible only by members of the Yakima Nation and its permittees. This area occupies essentially the western two-thirds of the Reservation. It covers approximately 807,000 acres, 740,000 of which fall within Yakima County. Of this latter figure, 25,000 acres are fee land.

The Closed Area is predominately forested (about two-thirds), the balance being classified as range land. The topography of this area varies from the gently sloping range land along its eastern edge, to deep river valleys in the central part and finally to the mountain peaks of the Cascade Range along its western boundary.

The "Closed Area" is relatively undeveloped. There are no permanent residences in the Yakima County portion of the area. Its abundant flora and fauna serve as a source of food for many members of the Yakima Nation; its forests provide substantial economic support; and its intangible and spiritual values play a significant role in the tribal culture. In sum, as this court found in Yakima Indian Nation v. Whiteside, et al., C-83-604-JLQ ("Whiteside I"), "the Closed

Area is an integral part of the Yakima Indian Nation."

The "Open Area", on the other hand, is strikingly dissimilar to the "Closed Area". As its name suggests, access to the area is not limited by the Yakima Nation and non-tribal members move freely throughout the area. Compared to the predominately forested "Closed Area", the "Open Area" is primarily composed of rangeland, agricultural land and land being used for residential and commercial purposes. Another distinguishing characteristic is that almost half of the total "Open Area" acreage is fee land. That factor, coupled with the extensive county-maintained road system and the residential and commercial developments render the "Open Area" a sharp contrast to the pristine, wilderness-like character of the "Closed Area".

Tribal Land Use Regulations:

In October 1970, the Yakima Nation instituted its first Zoning Ordinance. The ordinance was a six-page Tribal Resolution modeled after a similar Yakima County ordinance. The Zoning Ordinance designated all areas within the exterior boundaries of the reservation, both trust and fee lands (except the incorporated cities and towns) as being within the General Use District. All otherwise lawful uses were generally permitted except certain activities requiring a conditional use permit. E.g., asphalt mixing plants, junk yards, certain feedlots, above ground storage tanks, etc. The Board of Adjustment, composed of all the members of the Tribal Council, sat as the Board of Appeals from adminis-

trative decisions and the Hearing Board for conditional use applications. Its decisions were the final tribal action.

In May 1972, the Yakima Nation adopted a new zoning law, the Amended Zoning Ordinance, which remains in effect today. Like its predecessor, the Amended Zoning Ordinance expressly is made applicable to fee land. Besides that similarity, this twenty-seven page document resembles the original ordinance only in the composition of the Board of Adjustments and its function. Otherwise, it is much more detailed and comprehensive. Among other things, it establishes a requirement for building permits, minimum lot sizes, authorizes the establishment of Planned Development Districts, provides for Special Use Permits and creates five categories of Use Districts. These Use Districts are:

Agricultural, Residential, Commercial, Industrial and Reservation Restricted Area.

The at-issue Wilkinson property is zoned "agricultural" by the Yakima Nation. According to the Amended Zoning Ordinance, that designation denotes that the "principal use of the land is for agricultural purposes". Buildings are prohibited on land zoned "agricultural", except as follows: agriculture-related buildings, agriculture products processing plants, buildings on public parks and playgrounds and single-family dwellings. The minimum lot size in an agriculture use district is five acres. The Yakima Nation's designation of the at-issue property as "agriculture" and the resultant limited uses is the primary source of the present litigation.

Yakima County Land Use Regulations:

As early as 1946 the County of Yakima regulated land use within its boundaries. This regulation was, however, not extensive until 1965 when the county adopted its first zoning ordinance which, as stated previously, was the model for the Yakima Nation's initial zoning ordinance.

The present comprehensive zoning regulations, the Yakima County Code, was first enacted in 1972. It was struck down for a procedural defect, but readopted in its same form in October, 1974. Within its seventy-two pages, the Yakima County code identifies numerous specified use districts which generally regulate agricultural, residential, commercial, industrial, and forest-watershed uses. In the reservation area, the official county zoning map segre-

gates the fee lands from the trust lands. The county does not apply its zoning law to trust lands.

Yakima County has designated the subject Wilkinson property as "general rural". "General rural" is a use district established in a 1982 amendment to the Yakima County Code which eliminated a single "agricultural" designation and replaced it with three separate use districts: "exclusive agricultural;" "general agricultural;" and "general rural." Both the "exclusive" and "general" agricultural districts permit varied agriculture-related uses. The main difference between these two agricultural districts is that the former has a minimum lot size of 40 acres while the minimum lot size for the latter is 20 acres. Both agri-

cultural districts, however, allow the parcel to be subdivided once every five years to create a lot no more than two acres but no less than one-half acre in size. The two agricultural districts are expressly designated to protect the county's agricultural land and prohibit or minimize the impact of uses which are inconsistent with agricultural uses.

The "general rural" designation of the Wilkinson property, on the other hand, is designated to accomodate a broader range of uses. This district is intended to "provide protection for the county's unique resources and land base;" "minimize scattered rural developments . . . by encouraging clustered development;" and "permit only those uses which are compatible with [the] rural character". Although the "permitted uses" for this district are identical to

those of the "exclusive" and "general" agricultural districts, the potential number and variety of uses possible via special use permits are considerably greater. The minimum lot size in the "general rural" district is one-half acre but the average size of lots created by a subdivision must be at least one acre.

In addition to its comprehensive zoning regulations, Yakima County has other land use regulations applicable to fee land within the county. Its 1974 Subdivision Ordinance imposes standards for streets, water, sewage, drainage, parks and recreation areas, and school sites. The Yakima County Shoreline Master Program, adopted in 1974 as mandated by state law, regulates certain activities adjacent to shorelines. Also, as a participant in the federal flood insurance program the county attempts to

control flood plain development. Another of Yakima County's state-mandated land use regulations is its Environmental Ordinance which requires a review of the potential environmental impact of all non-exempt land use actions. None of the above-described regulations have been applied to trust lands on the Yakima Nation Reservation.

The Wilkinson Property:

Defendant Wilkinson owns a 40 acre tract of fee land in the extreme north-east corner of the Reservation.[3] The land is approximately three-quarters of a mile south of the Reservation's northern boundary. The parcel is situated on the northern slope of Ahtanum Ridge, overlooking the Yakima Municipal Airport

[3] Wilkinson is a non-Indian and is not a member of the Yakima Nation.

(1 1/2 miles to the north) and the City of Yakima (3 miles to the north). Wilkinson's property is bordered to the north by trust land and to the east, south and west by fee land. Currently, the property is vacant sagebrush land.

In September 1983 defendant Wilkinson applied to the Yakima County Planning Department to subdivide a portion of his 40 acre parcel. Specifically, by filing five contiguous short plat applications, Wilkinson proposed to subdivide 32 acres into twenty lots. The lot sizes range from 1.1 acres to 4.5 acres. The proposal contemplates that each lot will be used for a single family residence to be served by individual well and on-site septic systems.

In compliance with the county's Environmental Ordinance, Mr. Wilkinson submitted an Environmental checklist from

which the county Planning Department could assess the potential impact of his proposed development and decide whether an Environmental Impact Statement (EIS) was warranted. As discussed infra, the Planning Department initially issued a Declaration of Significance, necessitating the preparation of an EIS. That declaration was, however, withdrawn and replaced by a Declaration of Non-Significance after Wilkinson agreed to modify his proposal as suggested by the county.

Thereafter, the Yakima Nation timely appealed that Declaration of Non-Significance to the Yakima County Board of Commissioners. The grounds for the appeal were two-fold: (1) that Yakima County was without authority to regulate the land use of the Wilkinson property and (2) that the proposed Wilkinson

development would significantly affect the environment and therefore an EIS was required. A hearing on the Tribe's appeal was conducted by the County Commissioners on October 25, 1983. During the early stages of the hearing, the Yakima Nation strenuously argued the regulatory jurisdictional issue but, based upon advice from the county legal department, the Commissioners concluded that the appeal was properly before the Board and limited the appellants to presenting evidence as to the EIS issue only. Following hearing testimony and cross-examination of witnesses, the Commissioners found that the Wilkinson proposal would not have a significant impact on the environment and affirmed the County Planning Department's Declaration of Non-Significance.

Yakima County has withheld final disposition of Wilkinson's subdivision proposal pending the outcome of this litigation.

In addition to the factual background as set forth above, the court makes the following specific factual findings:

1. The proposed Wilkinson subdivision described real property situated in Yakima County, Washington:

> The Northeast Quarter of the Southwest Quarter of Section 10, Township 12 North, Range 18, East, W.M.

The property is approximately three miles south of the City of Yakima, one-quarter mile south of McCullough Road and approximately one-half mile east of 42nd Avenue.

2. The subject parcel lies within the exterior boundaries of the Yakima

Nation Reservation in the so-called "Open Area".

3. Three incorporated municipalities -- Harrah, Toppenish and Wapato -- with a total population of approximately 10,000 people lie within the "Open Area".

4. Roughly eighty percent of the "Open Area"'s residents are non-Indians. Those individuals represent approximately fourteen percent of the total population of Yakima County.

5. The "Open Area" is serviced primarily by close to five hundred miles of Yakima County-maintained roads.

6. Agriculture and related activities are the leading source of income in the "Open Area".

7. Yakima County has a Comprehensive Plan and a Rural Land Use Plan expressly designed to protect the

county's valuable agricultural land and other resources.

8. To effectuate the goals of those plans, the county has adopted a comprehensive zoning ordinance. The "Open Area" is primarily zoned "exclusive agriculture", "general agriculture" and "general rural". "Exclusive" and "general" agriculture zones predominate. Within the "Open Area" that zoning scheme achieves a delicate balance of protecting agricultural land and other resources while allowing for some development.

9. In part due to the parcel size requirements of the county's "exclusive" and "general" agriculture zones, i.e., 40 and 20 acres respectively, the Yakima County zoning scheme is more protective of the Open Area's agricultural lands than the Yakima Nation's "agricultural"

use district which allows agricultural land to be divided into 5-acre lots.

10. The trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Yakima Nation. The proposed Wilkinson development does not threaten a food source of members of the Yakima Nation.

11. Similarly, the Wilkinson project does not threaten the economic security of the Yakima Nation. The plaintiff has not demonstrated how Yakima County's regulation of the land use of Wilkinson's "Open Area" property in any way places its economic security in jeopardy.

12. In contrast to the "Closed Area", the "Open Area" is not of a unique religious or spiritual significance to the members of the Yakima Nation. The

county's regulation of the Wilkinson property will not significantly infringe on those cultural values.

13. While the court is aware of the special role which land and other natural resources play in the culture of the Yakima Indian Nation, the court finds that the county's exercise of its land use regulatory jurisdiction over the subject property does not threaten those aspects of the tribal culture.

14. The Yakima Nation's political integrity will not be diminished. The County's regulation of Wilkinson's fee land will not hinder the Yakima Nation from exercising its regulatory jurisdiction over the trust land.

15. In sum, the court finds that Yakima County's exercise of its regulatory jurisdiction over the at-issue Wilkinson property does not threaten and

will not have a direct effect on the Yakima Nation's political integrity, its economic security or its health or welfare.

LEGAL ANALYSIS

The court's legal analysis must focus on three issues: the regulatory jurisdiction question; the Yakima Nation's Section 1983 claim; and, the pendent state claim. Each of these issues will be addressed separately.

A. JURISDICTION TO REGULATE LAND USE:

The resolution of the jurisdictional dispute requires a two-step analysis. The court must first decide whether the Yakima Nation has any authority to regulate the activities of defendant Wilkinson on his Open Area fee land. If the tribe does indeed have that power,

then the next inquiry is whether Yakima County may exercise its concurrent jurisdiction over the same property. If, on the other hand, the Yakima Nation lacks the power to assert regulatory jurisdiction over Wilkinson's property, then the second step in the analysis is not necessary -- Yakima County will have exclusive authority over Wilkinson's fee land.

1. Tribal Authority: Public Law 280:

The defendants argue that Congress has stripped the Yakima Nation of any power it may have had to exercise civil regulatory authority over Wilkinson's property. Specifically, the defendants contend that when the State of Washington assumed jurisdiction over the Yakima Reservation pursuant to § 6 of the Act of

August 15, 1953, 67 Stat. 590 (Public Law 280) (hereinafter P.L. 280) the Yakima Nation was divested of its inherent tribal authority to regulate the activities of non-Indians on deeded land.[4] The gist of their argument is that P.L. 280 was a grant of jurisdiction to the state (and therefore the

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[4] WASH. REV. CODE § 37.12.010 provides:

Assumption of criminal and civil jurisdiction by state. The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd

county) which necessarily must have withdrawn jurisdiction from the Tribe. This argument is without merit for several reasons.

Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.021 [tribal consent] have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile dependency;
(6) Adoption proceedings;
(7) Dependent children; and,
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways.

Provided, further that Indian tribes that petitioned for, were granted or became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

To begin with, P.L. 280 neither increased nor diminished a state's authority over the reservation activities of non-Indians. In no way can it be construed as a grant of such authority -- no such grant was necessary. Under P.L. 280, states retain the same regulatory jurisdiction over the on-reservation activities of non-Indians "that they enjoyed prior to that Law". White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274, 1279 (9th Cir. 1981). And it is settled law that long before the enactment of P.L. 280, states

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This partial assumption of jurisdiction over Indians (based on the status of the land on which the questioned activity occurred) has been sanctioned by the Supreme Court. Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979).

(and presumably a political subdivision like Yakima County) had the power to assert sovereign powers over the reservation activities of non-Indians. See, e.g., Draper v. United States, 164 U.S. 240 (1896); Utah & Northern R.R. v. Fisher, 116 U.S. 28 (1885). The only limitations on that power are the independent but related barriers of "infringement on the inherent tribal sovereignty", see e.g., Williams v. Lee, 358 U.S. 217 (1959) and the doctrine of "federal preemption". See e.g., New Mexico v. Mescalero Apache Tribe, 103 S.Ct. 2378 (1983).

Further evidence that P.L. 280 did not in any way affect the powers of a state over non-Indians is the law's purpose. P.L. 280 was designed to remedy the problem of the lack of state juris-

diction over Indians in their dealings (criminal or civil) with non-Indians. See Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indian, 22 U.C.L.A. Law Rev. 535 (1975). The states needed Congressional authorization to exert power over Indians. No such authorization was needed, however, as to the states' authority over non-Indians. Thus, P.L. 280 was not a grant to the states of jurisdictional powers over non-Indians. Accordingly, it cannot be construed as supplanting the tribe's authority with state authority[5] or

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[5] Even if P.L. 280 were interpreted as an affirmation or expansion of the state's jurisdiction over non-Indians, it is limited to "civil litigation" and not "general state civil regulatory control" such as zoning. See Bryan v. Itasca County, 426 U.S. 373, 384-85 (1976); Barona Group of Captain Grande Band v. Duffy, 694 F.2d 1185, 1188 (9th Cir. 1982) (P.L. 280, does not enable California to impose its regulatory bingo

divesting the tribe of whatever inherent power it has over the reservation activities of non-Indians. See Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), cert. denied, 103 S.Ct. 293 (1983); Sechrist v. Quinault Indian Nation, I.L.R. 3064 (W.D. Wash. 1982). [6]

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laws on the reservation); United States v. City of Humboldt, 615 F.2d 1260 (9th Cir. 1980) (California municipality may not zone restricted lands); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1976) (California county may not zone restricted lands).

[6] Both cited cases upheld the Quinault Indian Nation's application of its zoning laws to non-indian owned deeded lands. The State of Washington exercises the same degree of P.L. 280 jurisdiction over the Quinault Indian Reservation as it does over the Yakima Reservation. See, Comenout v. Burdman, 84 Wn.2d 192 (1974). Implicitly then, these two cases must be interpreted as rejecting the notion that P.L. 280 stripped tribes of their civil jurisdictional authority.

2. Tribal Authority: The Montana Test:

Having concluded that P.L. 280 did not affect a Tribe's regulatory authority over non-Indian fee land, the court must now determine whether the Yakima Nation has such authority over Wilkinson's fee land. Although Indian Tribes possess "attributes of sovereignty over both their members and their territory", United States v. Wheeler, 435 U.S. 313, 323 (1975), the dependent status of tribes and their diminished status as sovereigns limits their power in relations between a Tribe and non-members of the Tribe. Id. at 326. In fact, Indian Tribes have been divested of the power to exercise any criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S.1 191 (1978). Similarly, a Tribe's inherent

power to exert civil jurisdiction over non-Indians has been diminished. While a Tribe does possess the power to "exclude nonmembers entirely or to condition their presence on the reservation", New Mexico v. Mescalero Apache Tribe, 103 S.Ct. 2378, 2385 (1983), apparently that power may be exercised over non-Indian fee lands only in limited circumstances. Montana v. United States, 450 U.S. 544 (1980). Thus, in certain situations a Tribe may "exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands." Id. at 565. Unfortunately, the parameters of that power are anything but settled; nevertheless, the Court has provided guidance which is pertinent to the case at hand.

The Montana Court identified two situations in which the exercise of tribal civil jurisdiction over non-Indian fee land may be appropriate. The first instance is where a non-Indian, through a business relationship or otherwise, has entered into a "consensual relationship" with the tribe or its members. Id. at 565. Such is not the case here as there is no evidence of any "consensual relationship" between the Yakima Nation and Wilkinson which would place the subject property within the authority of the Tribe.

The second situation described by the Montana Court is where the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe." Id. at 566. Thus, absent a "consensual relationship", the

critical factual determination which must be made in deciding whether a Tribe may regulate the land use of a non-Indian on fee land is whether the non-Indian's activities pose a threat to the Tribe's political integrity, its economic security or its health and welfare. Id. at 565-66; see United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) (tribe lacked power to regulate water use of non-Indian fee landowners within the reservation); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) (building, health and safety regulations applied to nonmember business located on fee lands within the reservation), cert. denied, 459 U.S. 967 (1982); Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982) (tribal zoning ordinance applied to fee land within the reservation); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) (tribe allowed to exercise regulatory authority over water use of Non-Indian fee landowners within the reservation), cert. denied, 454 U.S. 1092 (1981); Sechrist v. Quinault Indian Nation, 9 I.L.R. 3064 (W.D. Wash. 1982); Lummi Indian Tribes v. Hallover, 9 I.L.R. 3025 (W.D. Wash. 1982).

As stated in the Findings of Fact, this court finds that Wilkinson's proposed development does not pose a threat to the "political integrity", the "economic security" or the "health and welfare" of the Yakima Nation. The mere fact that the Tribe's zoning ordinance differs in some respects from that of Yakima County does not rise to the level of a "threat" to the Tribe. As applied in the "Open Area," Yakima County's

zoning ordinance will adequately regulate the land use of the fee lands and not pose a threat to the trust lands. Consequently, this court must conclude that the Yakima Nation is without the authority to exercise regulatory jurisdiction over Wilkinson's "Open Area" fee land.

B. SECTION 1983 CLAIM:[7]

The bases for the Yakima Nation's civil rights claim are twofold. First, the Tribe asserts that the County

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[7] 42 U.S. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

Commissioners denied it due process of law by not providing the Tribe a meaningful opportunity to be heard on the jurisdictional issue. Second, the Tribe argues that Yakima County's attempts to exercise jurisdiction over the Wilkinson property violated rights enforceable under Section 1983. For the reasons discussed below, the court concludes that neither of these two alleged bases of Section 1983 liability has merit.

Assuming that the Yakima Nation is a proper plaintiff in a Section 1983 action,[8] the court finds that it was not denied due process of law by the Yakima County Commissioners. The purpose of the

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[8] The parties have expended considerable effort in debating whether an Indian Tribe such as the Yakima Nation may bring a Section 1983 action. The resolution of that issue turns on whether the Tribe is "any citizen of the United States or other person within the jurisdiction

hearing conducted on October 25, 1983 was to hear the Tribe's appeal of the Planning Department's Declaration of Non-Significance. The hearing was statutorily mandated to provide the Tribe with the opportunity to convince the Commissioners that the Planning Department had erred and show that Brendale's proposed development warranted the preparation of an Environmental Impact Statement. The hearing was neither designed as a forum to contest jurisdiction nor was it an appropriate forum for such a debate. As demonstrated by the

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thereof. . . . " 42 U.S.C. § 1983 (emphasis added). Neither the court nor the litigants have located any legal precedent which directly addresses that issue. It is not, however, necessary to answer that novel question since the court concludes that the Yakima Nation has not been deprived of "any rights, privileges, or immunities secured by the Constitution and laws . . .." Id.

complexity of this lawsuit and the cases cited in this opinion, Indian reservation jurisdictional disputes are not easily resolved. It is unrealistic for the Yakima Nation to expect and even demand that it be given free reign at the administrative podium to argue and present evidence pertaining to the issue of jurisdiction, particularly when the Commissioner's sole function was to determine whether an EIS was warranted. The Commissioner's decision to allow the Yakima Nation to state its objections to the county's jurisdiction over the Wilkinson property and then going forward with the appeal hearing was the proper course of action. The Tribe suffered no infringement on its rights to due process of law. See generally Mathews v. Eldridge, 424 U.S. 319 (1976); Goss v.

Lopez, 419 U.S. 565 (1975); Goldberg v. Kelly, 397 U.S. 254 (1970).

While the Tribe's first basis for its Section 1983 Claim must fail because no due process deprivation occurred, its second basis fails because the county has not infringed on any "right" of the Tribe: the Yakima Nation has no "right" to regulate the land use activities on the Wilkinson property and therefore the county's regulation of that property does not infringe on any "right" of the Tribe.[9] Thus, the court concludes that

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[9] In contrast to this case, in Whiteside I the court determined that the Yakima Nation does have the authority to exercise regulatory jurisdiction over fee land within the "Closed Area". Furthermore, the court concluded that the County of Yakima is "preempted" from exercising its concurrent jurisdiction over that same land. Nevertheless, the court held that "preemption" does not give rise to a claim cognizable in a Section 1983 action.

the plaintiff has not stated a Section 1983 claim and is therefore not entitled to attorney's fees under Section 1988.

PENDENT CLAIM: SEPA VIOLATION

In addition to the regulatory jurisdiction issue which is governed by federal law, the Tribe asserts a pendent claim based upon Washington state law. Specifically, the Tribe alleges that Yakima County erred in its determination that the proposed Wilkinson subdivision would not have a significant adverse impact on the environment. See Wash. Rev. Code 43.21C.030(c). For the reasons discussed below, the court concludes that the declaration of non-significance was not "clearly erroneous" and, therefore, is affirmed. See, Norway Hill v. King County Council, 87 Wn.2d 267 (1976) (standard of review of "negative

threshold determinations" governed by "clearly erroneous" test).

Initially, Yakima County concluded that the proposed subdivision would have "a significant adverse impact on the environment." (Trial Exhibit 221-15). That Declaration of Significance identified two factors which led to the decision: (1) the potential impact of 1.5 miles of private access roads; and (2) the potential impact of private septic systems and individual wells in the "event of future redivision of the 20 lots." Id. The Declaration of Significance stated, however, that it could be withdrawn and replaced with a declaration of non-significance if certain conditions were met. Id. Those conditions were designed to prevent or mitigate the potential adverse effects of the private

access road, and the proliferation of individual septic systems. Id.

By written agreement with the County of Yakima, Mr. Wilkinson modified his proposal by agreeing to have the private roads designed and constructed according to proper engineering standards and maintained by a private road maintenance association. (Trial Exhibit 221-18). Additionally, Wilkinson agreed that "[a] note shall be placed on the face of each short plat limiting further division of any of the lots described on the said short plats unless and until an approved public water supply is developed to serve all of the parcels." Id. Because of these modifications the County withdrew its Declaration of Significance and issued a final Declaration of Non-Significance (Trial Exhibit 221-19), thereby negating

the requirement that an Environmental Impact Statement be prepared.

In a timely manner, this Tribe appealed the Declaration of Non-Significance to the Yakima County Commissioners. Following a hearing, the Commissioners found, inter alia, that "the potential adverse environmental impacts of the proposal as originally presented will be mitigated or prevented by the measures outlined in the agreement." (Trial Exhibit 222). Based upon their findings, the Commissioners concluded that "the proposed contiguous short plats submitted by Stanley L. Wilkinson will not have a significant adverse environmental impact" and affirmed the Declaration of Non-Significance. Id.

This court's review of the County's Declaration of Non-Significance is limited; the only question is whether it

was "clearly erroneous". Norway Hill v. King County Council, 87 Wn.2d 267 (1976). A determination is "'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Hayden v. Port Townsend, 93 Wn.2d 870, 880 (1980) (quoting, Norway Hill, 87 Wn.2d at 274). In applying that standard, this court is mindful that the "decision of the governmental agency shall be accorded substantial weight." Id. at 880 (quoting, Wash. Rev. Code 43.21C.090).

The Tribe, while conceding that the written agreement (Trial Exhibit 221-18) eliminated the pretrial adverse impact of the private roads, argues that the septic system problem has not been eliminated or sufficiently mitigated. That argument,

however, was rejected by the County Commissioners who found that the septic system problem "will be mitigated or prevented by the measures outlined in the agreement . . . " (Trial Exhibit 222). This court must also reject the Tribe's argument as the County's decision is not "clearly erroneous". It is supported by the recommendation of the Yakima Health District which had performed on-site inspections of soil profile holes (Trial Exhibit 221-12); the soil and slope classification of the United States Soil Conservation Service which indicates that portions of the subject property are suitable for "septic tank absorption fields" (Trial Exhibit 221-8); and, the testimony of Mr. Anderwald who stated that each of the newly created lots had a site suitable for an individual septic system. (Trial Exhibit 219 at p. 19).

That evidence, combined with the fact that no further subdivision is to occur absent the installation of a community water system leads this court to conclude that no "mistake has been committed," Norway Hill, 87 Wn.2d at 274, and the Declaration of Non-Significance was not "clearly erroneous."

CONCLUSION

Based upon the above Findings of Fact and legal conclusions, judgment shall be entered against the plaintiff and in favor of defendants to the following extent:

1. The court declares that the Yakima Nation has no authority to exercise regulatory jurisdiction over the land use of the Wilkinson property described in this memorandum opinion. Plaintiff's request for declaratory and injunctive relief is DENIED and its

regulatory jurisdiction claim is DISMISSED WITH PREJUDICE.

2. Plaintiff's Section 1983 claims are DISMISSED WITH PREJUDICE.

3. Yakima County's Declaration of Non-Significance is AFFIRMED and plaintiff's pendent state SEPA claim IS DISMISSED WITH PREJUDICE.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 10th day of September, 1985.

/s/
JUSTIN L. QUACKENBUSH,
United States District
Judge.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

YAKIMA INDIAN NATION,	)	
Plaintiff,	)	JUDGMENT IN A CIVIL CASE
vs.	)	
WHITESIDE, et al.,	)	CASE NUMBER: C-83-724-JLQ
Defendants.	)	

/ / Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

/X/ Decision by Court. This action came to trial or hearing by the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Yakima Nation has no authority to exercise regulatory jurisdiction over the land use of the Wilkinson property described in the preceding Memorandum Opinion. Plaintiff's request for declaratory and injunctive relief is

denied and its regulatory jurisdiction claim is dismissed with prejudice.

Plaintiff's Section 1983 claims are dismissed with prejudice.

Yakima County's Declaration of Non-Significance is affirmed and Plaintiff's pendent state SEPA claim is dismissed with prejudice.

September 11, 1985 /s/ J. R. Fallquist
Date Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, Plaintiffs-Appellees	)	
vs.	)	Nos. 85-4316
JIM WHITESIDE, et al	)	85-4433
Defendants,	)	85-4383
and	)	D.C. Nos. C83-724-JLQ
PHILIP BRENDALE, Defendant-Appellant.	)	C83-604-JLQ
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, Plaintiff-Appellants	)	ORDER SUPPLEMENTING RECORD AND DENYING PETITION FOR REHEARING
vs.	)	
COUNTY OF YAKIMA, et al., Defendants-Appellees	)	

BEFORE: SKOPIL, FLETCHER, and POOLE, Circuit Judges.

Request of County of Yakima to supplement its petition for rehearing is GRANTED. The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

25 USC § 348: Patents to be held in trust; descent and partition.

Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever:

Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this

act: And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the Treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall

also be prescribed by Congress: Provided, however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any

contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office [Bureau of Land Management], and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization

is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purpose heretofore granted by law. And hereafter in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the

United States shall be preferred. Provided further, That whenever the Secretary of the Interior shall be satisfied that any of the Indians of the Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever; and the Secretary of the Interior is authorized and directed to ascertain, as

soon as shall be practicable, whether any of said Indians of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of this Act.

25 USC § 349. Patents in fee to allottees.

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act [25 USCS § 348], then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law[. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States

who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indi- to tribal or other property]: Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affai s at any time to cause to be issued to such allottee a patent in fee

simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States; And provided further, That the provisions of this Act shall not extend to any Indians in the Indian Territory.

Public Law 280, Sections 3-7,
67 Stat. 590:

Sec. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

Sec. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian

country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California.....	All Indian country within the State
Minnesota.....	All Indian country within the State, exept the Red Lake Reservation
Nebraska.....	All Indian country within the State
Oregon.....	All Indian country within the State, except the Warm Springs Reservation

Wisconsin.....All Indian country within
the State, except the
Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Sec. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to

remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

RCW 37.12.010:

The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country and lands within this State in accordance with the consent of the United States given by the Act of August 15, 1953 (Public Law 280, 83rd Congress, First Session), that such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian Reservation when held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile dependency;

(6) Adoption proceedings;

(7) Dependent children; and,

(8) Operation of motor vehicles on public streets, alleys, roads and highways; Provided, further, that Indian tribes that petitioned for and were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963, shall remain subject to state civil and criminal jurisdiction as if Chapter 36, Laws of 1963, had not been enacted.

TREATY WITH THE YAKIMAS, 1855

12 Stat. 951, June 9, 1855-Treaty

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, Walla Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chief, chiefs, headmen and delegates of the Yakama, Palouse, Pisquose, Wenatchapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skinpah, Wishham, Shyihs, Oche-choes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in

Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama", with Kamiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

Cession of Lands

ARTICLE I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to-wit:

Boundaries

Commencing at Mount Rainier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and

the southern tributaries of the Methow River have their rise: thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and 10 minutes (119° 10',) which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the 952 forty-seventh (47°) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence, in a southeasterly direction, to the

Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thencé down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White banks," below the Priest's rapids; thence westerly to a lake called "La Lac;" thence southerly to a point on the Yakima River called Toh-Mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all of which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide

between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

Reservation

ARTICLE II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to-wit:

Boundaries

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers; thence down said spur to the divide

between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the Superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same within one year after the

ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the

direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE III. And provided, That, if necessary for the public convenience, (953) roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Privileges Secured to Indians

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Payments by the United States

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the

following manner, that is to say: sixty thousand, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: for the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year; and for the next five years, four thousand per year.

All which sums of money shall be applied to the use and benefit of said

Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

United States to Establish Schools

ARTICLE V. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated

tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and ploughmaker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and ploughmaker, for the intruction of the Indians in trades and to assist them in the same: to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a

physician; and to erect, keep in repair, and provided with the necessary furniture, the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon, to perform many services of a public character, occupying much of his time, the United States further agrees to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said (954) confederated tribes and

bands of Indians may select to be their head chief; to build for him at a suitable point on the reservation a comfortable house and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

Kamaiakun Is the Head Chief

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakama nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be

defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be charged upon the annuities, but shall be defrayed by the United States.

Reservation May Be Surveyed

ARTICLE VI. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regu-

lations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Annuities Not to Pay Debts of Individuals

ARTICLE VII. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or

destroyed, compensation may be made by the government out of the annuities.

Not to Make War But in Self Defense

Nor will they make war upon any other tribe, except in self-defense, but will submit all matters of differences between them and other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

Wenatshapam Fishery Reserved

ARTICLE X. And provided, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and

known as the "Wenatshapam fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

When Treaty to Take Effect

ARTICLE XI. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

(955) In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates to the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year herein-

before written.

ISAAC I. STEVENS,
Governor and Superintendent

KAMAIAKUN, his X mark
SKLOOM, his X mark
OWHI, his X mark
TE-COLE-KUN, his X mark
LA-HOOM, his X mark
ME-NI-NOCK, his X mark
ELIT PALMER, his X mark
WISH-OCH-KMPITS, his X mark
KOO-LAT-TOOSE, his X mark
SHEE-AH-COTTE, his X mark
TUCK-QUILLE, his X mark
KA-LOO-AS, his X mark
SCHA-NOO-A, his X mark
SLA-KISH, his X mark

Signed and sealed in presence of

JAMES DOTY,
Secretary of Treaties

MIE. CLES (JEAN CHARLES)
PANDOSY, O.M.I.

WM. C. McKAY

W. H. TAPPAN,
sub Indian AGent, W. T.

C. CHIROUSE, O.M.I.

PATRICK McKENZIE, Interpreter

A. D. PAMBURN (PAMBRUN),
Interpreter

JOEL PALMER, Supt. of
Indian Affairs, O.T.

W. D. BIGLOW

A. D. PAMBURN (PAMBRUN),
Interpreter

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the said Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION,

SENATE OF THE UNITED STATES,

March 8, 1859

"Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent in the ratification of treaty between the United States and the head chief, chiefs, headmen, and dele-

gates of the Yakama, Palouse, and other confederated tribes and bands of Indians, occupying lands lying in Washington Territory, who, for the purpose of this treaty, are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, signed 9th June, 1855.

"Attest:

"ASBURY DICKENS, Secretary."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March eighth, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

(956) In testimony whereof, I have hereunto caused the seal of the United

States to be affixed, and have signed the same with my hand.

Done at the City of Washington, this eighteenth day of April, in the year of our Lord, one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN

By the President:

LEWIS CASS, Secretary of State

(3)

NO. 87-1622

Supreme Court, U.S.
FILED
MAY 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

PHILIP BRENDALE,

Petitioner,

vs.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1) Does the Yakima Indian Nation have inherent power to provide comprehensive land use and zoning regulations for the non-incorporated lands of the Yakima Indian Reservation?

2) Does Yakima County threaten the political integrity or economic security of the Yakima Indian Nation by imposing its land use and zoning regulations on the non-incorporated fee lands of the Yakima Indian Reservation owned by non-members which regulations disrupt the comprehensive land use plan and regulations of the Yakima Indian Nation?

3) Was the Court of Appeals correct in determining under a *Montana v. United States,* 450 U.S. 544 (1981) analysis, that the interest of the Yakima Indian Nation, as shaped by federal policy, in providing ultimate land use and zoning regulation for non-Indian owned fee land in the closed area of the Yakima Indian Reservation, outweighed the interests of Yakima County in providing such regulation?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATUTES, TREATIES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
A. Petitioner's Arguments to Support Certiorari have been Previously Rejected by this Court	5
B. Both the Ninth Circuits and the District Court Decisions were Correct Applications of the Montana Test	8
C. A Writ of Certiorari is Not Justified by Other Arguments of Petitioner	10
CONCLUSION	12
APPENDIX	
Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County, et al., 828 F.2d 529 (9th Cir. 1987)	1-A
Findings of Fact and Conclusions of Law *(Whiteside I)* (E.D. Wash. February 2, 1984)	20-A
Yakima Indian Nation v. Whiteside (Whiteside I), 617 F. Supp. 735 (E.D. Wash. 1985)	33-A
Treaty With The Yakimas, 12 Stat. 951	65-A

TABLE OF AUTHORITIES

	Page
CASES	
Bryan v. Itasca County, 426 U.S. 373 (1976)	6, 7
California v. Cabazon Band of Mission Indians, 480 U. S. —, 107 S. Ct. 1083 (1987)	6, 7
Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976)	6
Montana v. United States, 450 U.S. 544 (1981)	6, 8
Morton v. Mancari, 417 U.S. 535 (1974)	11
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 (1978)	9
Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, 174 (1977)	9
Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987)	8
United States v. Brendale, et ux., C-74-197 (Ed. Wash., 8/27/74)	11
United States v. Mazurie, 419 U.S. 544 (1975)	11
Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)	7
FEDERAL CONSTITUTIONAL PROVISIONS	
Article I, Section 8, Clause 3	2, 11
STATUTES	
25 U.S.C. Sec. 331	5
25 U.S.C. Sec. 461	6
28 U.S.C. Sec. 1360 (Section 4 Public Law 280)	6, 7
TREATIES	
Treaty With The Yakimas, 12 Stat. 951	2, 8

NO. 87-1622

In The

Supreme Court of the United States

October Term, 1987

PHILIP BRENDALE,

Petitioner,

vs.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

The respondent, Confederated Tribes and Bands of the Yakima Indian Nation, respectfully prays that the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

STATUTES, TREATIES AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those set forth in the Petiton for a Writ of Certiorari, respondent would add:

A. Constitutional Provision:

1. Article I, Section 8, Clause 3:

"To regulate commerce with foreign nations and among the several states, and with the Indian tribes."

———o———

STATEMENT OF THE CASE

The Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Nation) are a composite of fourteen (14) tribes who came together and negotiated a treaty with the United States which was signed by the parties in 1855. The *Treaty with the Yakimas,* was ratified by Congress in 1869, 12 Stat. 951. (34-A) In this Treaty, the Yakima Nation ceded vast areas of land to the United States reserving however an area of land for their use and occupation to themselves which is now known as the Yakima Indian Reservation. (65-A) The *Treaty with the Yakimas,* provided these reserved lands would be for the "exclusive use and benefit" of the Yakima Nation, and that no white man, except those in the employ of the Indian Department, shall be permitted to reside upon said Reservation without permission of the tribe. (67-A)

The Yakima Indian Reservation is located in Southeast Washington. The Reservation's boundaries encompass approximately 1.3 million acres of land, most of which

is located in Yakima County. Of the 1.3 million acres approximately eighty (80%) percent or 1.04 million acres is held in trust by the United States for the benefit of the Yakima Nation or its individual members. The remaining land, approximately 260,000 acres are held in fee by both individual members and by non-Indians. (35-A)

The Yakima Indian Reservation was divided by the Yakima Nation into two (2) areas for purposes of non-members. The Yakima Nation created a "closed" area of the Reservation, access to which is limited to Yakima Nation members and to non-members who receive permits. The remainder of the Reservation is open to non-members without restriction. (35-A)

The closed area of the Reservation consists of 807,000 acres, 740,000 of which are located in Yakima County. There are approximately 715,000 acres of trust land and 25,000 acres of fee land in the closed area within Yakima County. Most of the fee land in the "closed" area in Yakima County is owned by a timber company. (35-A) The "open" area of the Reservation consists of approximately 500,000 acres, 350,000 of which are located in Yakima County. Of this, approximately fifty (50%) percent, or 175,000 acres is trust land and the other fifty (50%) percent, or 175,000 acres is fee land. (7-A)

The "closed" area of the Reservation is relatively undeveloped. There are no permanent residents in the 740,000 acres of "closed" area in Yakima County. (35-A) The closed area is predominantly forest lands (approximately 67 percent) with the balance being classified as range land. Ingress and egress to the closed area is monitored and controlled by four tribally-operated guard stations and by

tribal police and game officers patrolling the interior of the area. (37-A)

The closed area of the Reservation provides a major source of income to the Yakima Nation. Approximately ninety (90%) percent of the annual tribal income is derived from timber harvested therein. (47-A) The closed area of the Reservation also contains many places of cultural and religious significance. (47-A) The closed area also provides an abundance of natural foods and wildlife to tribal members. (47-A) The land use and zoning code of the Yakima Nation regulates all land in the closed area, both trust and fee. The land use and zoning code of Yakima County only regulated the fee land scattered in the confines of the closed area.

The land to which this dispute relates is owned by Philip Brendale, a non-member of the Yakima Nation. Mr. Brendale owns 160 acres of fee land in the forested portion of the closed area. (40-A) In April, 1983, Mr. Brendale submitted a long plat application to Yakima County to divide a twenty-acre parcel into ten two-acre lots, with the intent that the lots be sold as summer cabin or trailer sites. The Yakima Nation challenged the jurisdiction of Yakima County to regulate the use of the Brendale land. The Yakima County Commissioners determined that Yakima County had jurisdiction to determine the land use and zoning for the Brendale land. (42-A)

As a result, an action was commenced by the Yakima Nation in the United States District Court seeking injunctive relief and a declaratory judgment against Yakima County, Mr. Wilkinson and others. The District Court granted a judgment in favor of the Yakima Nation ruling

that the Yakima Nation had a substantial and significant interest in the regulation of land use and zoning of the non-member owned fee lands in the closed area and that Yakima County had no interest in providing such regulation authority. The District Court "balanced" the interest of the Yakima Nation against those of Yakima County. The District Court determined that the Yakima Nation had maintained its inherent authority to regulate non-members in the closed area of the Reservation, and because the interests of the Yakima Nation outweighed those of Yakima County, the District Court ruled that the Yakima Nation had ultimate land use and zoning authority of the non-member owned feel and in the closed area. (57-A)

The Ninth Circuit Court of Appeals affirmed the District Court. In an opinion which consolidated this case, *Whiteside I*, with its companion case, *Whiteside II*, the Court of Appeals held that the Yakima Nation did have inherent authority to regulate non-member owned fee land on the Reservation and that the District Court correctly determined that the interests of the Yakima Nation clearly outweighed those of Yakima County in providing land use and zoning regulation for non-member owned fee land in the closed area of the reservation. (17-A)

REASONS FOR DENYING THE WRIT

A.) Petitioner's Arguments to Support Certiorari have been Previously Rejected by this Court.

This case does not merit certiorari. Petitioner's argument that the Dawes (Allotment) Act (25 U.S.C. Sec. 331 et seq.) and/or Public Law 280 have divested the

Yakima Nation of the inherent sovereign authority to provide civil regulatory authority over the activities of non-members on fee lands has been soundly rejected by this Court in previous cases. *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463 (1976) and *Montana v. United States,* 450 U.S. 544 (1981) both recognize the repudiation of the Allotment Act. In *Moe* at 478-479, this Court recognized that the Indian Reorganization Act (25 U.S.C. Sec. 461 et seq.) and other legislation have reversed the policies behind the Allotment Act. In *Montana* at 559-560 in Footnote 9, this Court continued to recognize the lack of vitality left in the Allotment Act. *Montana* also recognizes that lands allotted in fee under the Allotment Act may be now owned by non-members, and then provides certain tests under which issues of tribal regulation of non-members on fee lands will be measured. The key test set forth by this Court is as follows:

> "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."

Montana v. United States, supra, at 566.

Montana and *Moe* make it very clear that the Allotment Act has no bearing whatsoever as to issues involving a tribe's land use and zoning regulation of non-member owned fee lands.

Public Law 280 has no bearing on this issue. This Court has ruled in both *Bryan v. Itasca County,* 426 U.S. 373 (1976) and again in *California v. Cabazon Band of Mission Indians,* 480 U.S. —, 107 S. Ct. 1083 (1987) that Public

Law 280 does not intrude upon inherent tribal regulatory authority. Petitioner's reliance on *Washington v. Yakima Indian Nation,* 439 U.S. 463 (1979) is misplaced. Public Law 280 was enacted to redress the lack of adequate Indian forums for resolving private legal disputes between Indians, and between Indians and other private citizens, by permitting the courts of the states to decide such disputes. *Bryan v. Itasca County, supra,* at 383. It is in this context in which civil laws are extended unto Reservation lands. In construing the purpose and extent of Public Law 280, this Court stated at 384, foootnote 10 as follows:

> "A fair reading of these two clauses suggests that Congress never intended 'civil laws' to mean the entire array of state non-criminal laws, but rather Congress intended civil laws . . . of general application to private persons or private property would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchiess, etc. These are not within the fair meaning of 'private' laws."

In *Washington v. Yakima Indian Nation, supra,* the issue concerned whether the partial assumption of civil jurisdiction by the state of Washington was valid. This Court found such partial assumption to be valid in spite of its checkerboard effect. However, Washington's assumption of Public Law 280 jurisdiction did not include laws declaring or implementing the state's sovereign powers. This conclusion is mandated by both *Bryan* and *California v. Cabazon Band of Mission Indians, supra.*

B.) Both the Ninth Circuit and the District Court Decisions were Correct Applications of the Montana Test.

Petitioner argues that both the Ninth Circuit and the District Court failed to properly apply the test of *Montana* to the facts presented as evidence. Petitioner argues that Yakima County's efforts to provide ultimate land use and zoning authority to the fee land owned by non-members in the closed area of the Reservation did not constitute a threat to the political integrity, economic security or health or welfare of the Yakima Nation.[1] Petitioner's argument ignores the record.

The record before the Ninth Circuit and District Court established that the Yakima Nation derives its authority not only implicitly from congressional policy, but explicitly from the *Treaty with the Yakimas,* 12 Stat. 951. Article II and Article V of this treaty and the treaty minutes establish that the Yakima Nation was to remain a sovereign Indian tribe with governmental authority over its land and people. The record before the Ninth Circuit established that this inherent authority has been exercised and maintained by the Yakima Nation since the time of the Treaty. The inherent sovereign authority includes the exercise of land use regulation by a tribe over its lands. *Segundo v. City of Rancho Mirage,* 813 F.2d 1387 (9th Cir. 1987).

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[1] Yakima County chose not to appeal the decision of the District Court in the proceeding below (*Whiteside I*). Petitioner continues to seek to have Yakima County regulate the land use and zoning for his property without the County's participation or apparent support.

The record before the Ninth Circuit also demonstrated that contrary to some Indian tribes,[2] the Yakima Nation and its members have maintained ownership of the vast majority of the Yakima Indian Reservation. This Reservation consists of 1.3 million acres of land. Approximately eighty (80%) percent or 1.04 million acres of this land remains held in trust for the benefit of the Yakima Nation and its individual members. Approximately two-thirds (807,000 acres) of the Reservation is closed to non-members. Of this closed area, 740,000 acres are located in Yakima County. Only 25,000 acres of the closed area within Yakima County are held in fee. Petitioner and Yakima County agreed that the Yakima Nation had authority to regulate the trust lands. Petitioner argues that Yakima County should provide ultimate land use and zoning authority for approximately 3.3 percent of the closed area of the Reservation under a land use and zoning code which violently conflicts with the land use and zoning code which without question regulates the remaining 96.7 percent of the closed area.

The land use and zoning code of the Yakima Nation is designed to protect and enhance the natural resources, natural foods, medicines, game wildlife, and environment of the closed area. Under the land use and zoning code of the Yakima Nation, construction of permanent residences is prohibited. Construction of any building is limited to specific circumstances which involved timber manage-

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[2] For example, in the Puyallup Indian Reservation, the Puyallup tribe had alienated in fee all but 25 acres of the 18,000 acre reservation. *Puyallup Tribe v. Washington Game Dept.,* 433 U.S. 165, 174 (1977) and on the Port Madison Reservation, the Suquamish Indian tribe had alienated in fee, sixty-three (63%) percent of the 7,276 acre reservation. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 193 (1978).

ment or furtherance of other tribal resources. Yakima County has no roadways in the closed area. Yakima County provides no law enforcement or fire protection in the closed area.

The land use and zoning code of Yakima County would have permitted the construction of single family dwellings, commercial campgrounds, motels, restaurants, bars, and general stores on fee land in the closed area of the Reservation. Such land use would undeniably disrupt the land use and zoning plan of the Yakima Nation. Petitioner had sought approval from Yakima County for a plat, the lots of which were to be sold as cabin or trailer sites. The record before the Ninth Circuit and District Court contained overwhelming evidence of the economic, environmental and cultural objections and concerns to Yakima County's efforts to provide land use and zoning authority to the fee lands owned by non-members in the closed area.

Based on these facts and others, the Ninth Circuit was compelled to conclude that Yakima County's efforts to impose its conflicting zoning code in the closed area of the Reservation was an unmistakable threat to the political integrity and economic security of the Yakima Nation. The record also demonstrated that the interests of the Yakima Nation clearly outweighed those of Yakima County in providing land use and zoning regulation to the fee land owned by non-members in the closed area. As such, the decisions of the Ninth Circuit and the District Court were a correct application of the *Montana* rules.

C.) A Writ of Certiorari is Not Justified by Other Arguments of Petitioner.

Petitioner argues that the creation and enforcement of the closed area of the Reservation violates his Fifth

Amendment rights.[3] Petitioner argues that there are two (2) classes of fee land owned by non-members; one class in the closed area and a second class in the open area of the Reservation. This argument misconstrues the Ninth Circuit decision in *Whiteside II*. Further, even if the Ninth Circuit had sustained the District Court in *Whiteside II*, the classifications made by the Yakima Nation and the District Court would clearly be sustained by legitimate constitutional and governmental objectives. Article I, Sec. 8, Clause 3 gives Congress the power to regulate commerce within Indian tribes. Classifications by tribal governments or the federal courts which result in two (2) classes receiving differing treatment because of legitimate tribal objectives are sustained by this constitutional provision. *Morton v. Mancari,* 417 U.S. 535 (1974). Petitioner's arguments that the Yakima Nation has no inherent power to regulate the land use of his fee land because he does not belong to or can not participate in tribal government has been addressed by this Court and rejected in *United States v. Mazurie,* 419 U.S. 544 (1975).

—o—

[3] Petitioner had challenged the closure on constitutional grounds in a federal court proceeding which occurred prior to the proceeding hereinbelow. The District Court sustained the validity of the "closure" in *United States v. Philip Brendale, et ux.*, C-74-197 (Ed. Wash., 8/27/74)

CONCLUSION

For the foregoing reasons and authorities, certiorari should be denied.

Respectfully submitted,

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APPENDIX A

CONFEDERATED TRIBES and BANDS
of the YAKIMA INDIAN NATION,

Plaintiffs-Appellees

v.

JIM WHITESIDE, et al., Defendants,

and

PHILIP BRENDALE, Defendant-Appellant.
CONFEDERATED TRIBES and BANDS
of the YAKIMA INDIAN NATION,

Plaintiffs-Appellants,

v.

COUNTY of YAKIMA, et al.,

Defendants-Appellees.

Nos. 85-4316, 85-4433 and 85-4383.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 6, 1986.

Decided Sept. 21, 1987.

Yakima Indian Nation brought two actions seeking declaratory judgments and injunctions upholding its right to impose its zoning and land use laws on fee land owned by non-Indians within reservation. The United States District Court for the Eastern District of Washington, JUSTIN L. QUACKENBUSH, J., 617 F.Supp. 735, 617 F. Supp. 750, held in part for Indian Tribe, and in part for county, and appeals were taken. The Court of Appeals,

Fletcher, J., held that: (1) county was precluded from zoning fee land within closed area of Indian reservation, and (2) remand was required to balance federal, tribal and county's interests in imposing zoning ordinances on fee land owned by non-Indians in open area of reservation. First case affirmed; second case reversed and remanded.

1. Indians 32(10)

Statute granting state courts jurisdiction over civil litigation involving reservation Indians did not intrude upon tribal regulatory authority, and thus did not affect Indian tribe's authority to zone. West's RCWA 37.12.010; 18 U.S.C.A. § 1162; 28 U.S.C.A. § 1360.

2. Indians 32(8)

States may impose laws on non-Indians engaged in activities upon Indian reservations unless given law is preempted by federal law or unless it unlawfully infringes on right of reservation Indians to self-government; court must balance interests of federal, tribal and state authorities to determine whether state is precluded from regulating particular conduct of non-Indians on Indian reservations

3. Indians 32(10)

Indian tribe had authority to zone non-Indian fee land within reservation boundaries.

4. Indians 32(10)

County was precluded from zoning land owned in fee by non-Indian within closed area of reservation given significant interests of Indian tribe, as shaped by federal policy of recognizing Indian sovereignty and encouraging

tribal self-government, and absence of any interest of county beyond general interest in providing regulatory functions to its taxpaying citizens.

5. Indians 32(10)

Remand was required, in zoning dispute between county and Indian tribe, for factual determination of whether interest of tribe, as shaped by federal policy of recognizing Indian sovereignty and encouraging tribal selfgovernment, outweighed interest of county in imposing zoning ordinances on fee land owned by non-Indians in open area of reservation.

James B. Hovis, Yakima, Washington, for plaintiffs-appellants.

Charles C. Flower, Jeffrey C. Sullivan, David A. Thompson, and Patrick Andreotti, Yakima, Washington, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Washington.

Before SKOPIL, FLETCHER and POOLE, Circuit Judges.

FLETCHER, Circuit Judge:

The Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Nation) brought these two cases in federal court seeking a declaratory judgment and an injunction barring the defendants from making or permitting any land use within the Yakima Indian Reserva-

tion that is contrary to the Amended Zoning Regulations of the Yakima Nation. In *Whiteside I,* 617 F.Supp. 735, the district court found that Yakima Nation's interests in zoning fee land owned by non-members within the closed area of the reservation were infringed by the application of Yakima County's (the County) zoning ordinances and therefore precluded county zoning. By contrast, in *Whiteside II,* 617 F.Supp. 750, the district court found that Yakima Nation did not have the authority to zone non-Indian fee land in the "open" area, and permitted application of the County's ordinances.

Defendant Philip Brendale, record owner of fee land in the closed area at issue in *Whiteside I,* appeals on the ground that Yakima Nation has no interest in regulating fee land owned by non-members. We affirm the judgment in *Whiteside I.* Yakima Nation appeals the judgment in *Whiteside II* and argues that the tribe has the authority to zone non-Indian fee land in the open area, and further that the federal and tribal interests outweigh the County's interest in regulating the land. We agree that Yakima Nation possesses the requisite authority to zone, and remand to the district court to balance the federal, tribal and County's interests.

FACTS

I. Whiteside I

The Yakima Indian Reservation is composed of 1.3 million acres of land. Of this amount, about 807,000 acres, including 740,000 acres in Yakima County, fall within the reservation's closed area. Only 25,000 acres of the closed area within Yakima County are held in fee. The closed area is restricted to members of Yakima Nation

and permittees in order to protect and enhance its natural resources, natural foods, medicines, game wildlife, and environment. Much of the closed area is forested with timber, a mainstay of Yakima Nation's economic operations. The closed area is relatively undeveloped. There are no permanent residents in the part of the closed area located in Yakima County.

In 1970, Yakima Nation adopted its first zoning ordinance. The ordinance was made more comprehensive in 1972. The tribal code provides for five categories of districts: agricultural, residential, commercial, industrial and restricted. It also establishes requirements for building permits, authorizes the creation of Planned Development Districts, and provides for special use permits. Under the tribal code, only the following uses are permitted in the closed area:

1. Harvesting wild crops;

2. Grazing, timber production or open field crops;

3. Hunting or fishing by Tribal members;

4. Camping in temporary structures;

5. Tribal camps for the education and recreation of tribal members.

6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of tribal resources;

7. No building or other permanent structure or any appurtenances thereto other than those allowed in Sections 1-6 above shall be allowed in this district;

8. Any structure which is authorized in Sections 1-6 above shall be set back 200 feet from any waterway.

Yakima County has regulated land use since 1946, but passed its first comprehensive zoning ordinance in 1965. Within the reservation, the County regulates fee land but not trust land. The County zoned the closed area as "forest watershed," which permits such structures as single family dwellings, commercial campgrounds, overnight lodging facilities with less than sixteen units, restaurants, bars, and general stores. The forest-watershed district is designed to conserve land and water while accommodating pressures for residential, recreational and commercial uses. The County has other land-use regulations applicable to fee land. These include the 1974 subdivision ordinance, which impose standards for streets, water, sewage, drainage, parks and recreation areas, and school sites the Yakima County Shoreline Master Program and a federal flood insurance program.

The Brendale property consists of 160 acres of fee land within the forested portion of the closed area. The nearest county road is over twenty miles away. In January, 1982, Brendale filed four contiguous short plat applications with the Yakima County Planning Department, which issued a Declaration of Non-Significance and later approved the applications. In April, 1983, he submitted a long plat application to divide one of his new twenty-acre parcels into ten two-acre lots. He intended the lots to be sold as summer cabin or trailer sites. The County Planning Department issued a Declaration of Non-Significance, which Yakima Nation appealed on the grounds that the County did not have authority to regulate the Brendale land and that the development would significantly affect

the environment. The Commissioners found that the County had jurisdiction, but that an Environmental Impact Statement (EIS) should be prepared. Yakima Nation brought this suit as the County began work on EIS.

II. Whiteside II

Approximately half of the land in the open area is held in fee. Most of the open area is rangeland, and land used for agriculture, and residential and commercial developments. Agriculture and related activities are the primary source of income. Non-members are permitted to move freely in this area. The County maintains an extensive road system of nearly five hundred miles throughout the open area. Most of the fee land lies within the three incorporated towns of Toppenish, Wapato and Harrah. The rest is scattered throughout the reservation in a checkerboard pattern, some clustered in particular areas. Roughly eighty percent of the population of the open area, including that of the incorporated towns, are non-members of Yakima Nation. It appears that neither Yakima Nation nor the County regulates land use within the incorporated towns.

Under Yakima Nation's Amended Zoning Ordinance, the Wilkinson property is zoned "agricultural." This designation indicates that the "principal use of the land is for agricultural purposes." All buildings are prohibited except agriculture related buildings, agriculture product processing plants, buildings on public parks and playgrounds and single family dwellings. The minimum lot size is five acres. This is the only type of agricultural district under the Yakima Nation's Code.

The County's agricultural zones include three types: "exclusive agricultural," "general agricultural," and "general rural." Under "exclusive agricultural" lot size minimums are forty acres, under 'general agricultural," twenty acres, and under "general rural," one acre. The County has designated the Wilkinson property as "general rural." This zoning is intended to "'provide protection for the county's unique resources and land base;' 'minimize scattered rural developments . . . by encouraging clustered development;' and 'permit only those uses which are compatible with [the] rural character.'" District court opinion in *Whiteside II*, at 753. The number and variety of uses possible under special use permits is considerably greater than those allowed within exclusive and general agricultural districts. As noted above, the County has other extensive land-use regulations.

The Wilkinson property is a forty-acre tract of fee land about three-quarters of a mile south of the reservation's northern boundary. The City of Yakima is three miles to the north of the tract. The property is vacant sagebrush land.

In September, 1983, Wilkinson applied to the Yakima County Planning Department to subdivide thirty-two acres into twenty lots ranging in size from 1.1 to 4.5 acres, each lot to be used for a single family residence. Wilkinson submitted an environmental checklist from which the Planning Department initially determined that an EIS was required. However, the Planning Department issued a Declaration of Non-Significance after Wilkinson agreed to modify his proposal. Yakima Nation appealed, arguing that the County was without authority to regulate and that the proposal would significantly affect the environ-

ment. The Commissioners affirmed and Yakima Nation filed suit in federal court.

DISCUSSION

I. *Public Law 280*

[1] Brendale and the County maintain that Washington's enactment of Wash.Rev.Code § 37.12.010, adopted pursuant to Pub.L. No. 280, 67 Stat. 588 (1953) *as amended*, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 and Supp. III 1985) (Public Law 280), divested Yakima Nation of authority to regulate the activities of non-Indians on fee-owned land within reservation boundaries. This argument lacks merit. Public Law 280 grants state courts jurisdiction over civil litigation involving reservation Indians, but does not intrude upon tribal regulatory authority. *California v. Cabazon Band of Mission Indians*, — U.S. —, 107 S.Ct. 1083, 1087-88, 94 L.Ed.2d 244 (1987). Because zoning is clearly regulatory, Public Law 280 does not affect Yakima Nation's authority to zone.

II. *Preemption and Infringement*

[2] Yakima Nation's claim, in essence, is that the state, acting through the County, is barred from imposing its zoning ordinances to control non-member fee land on the reservation. States may impose laws on non-members engaged in activities on Indian reservations unless a given law is preempted by federal law or unless it "'unlawfully infringes on the right of reservation Indians to self-government"' *United States v. Anderson*, 736 F.2d 1358, 1363 (9th Cir. 1984) (quoting *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir.), *cert. denied*, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981). We must balance

the interests of federal, tribal and state authorities to determine whether a state is precluded from regulating particular conduct of non-members on Indian reservations. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145, 100 S.Ct. 2578, 2584, 65 L.Ed.2d 665 (1980); *see also Segundo v. City of Rancho Mirage,* 813 F.2d 1387, 1391 (9th Cir. 1987).

1. *Federal Preemption*

Yakima Nation asserts that federal law preempts the application of state law. It lists a number of federal statutes that Yakima Nation maintains embody federal policy to provide for tribal self-government and protection of reservation resources. Broad preemptive effect is accorded not only specific federal statutes, but the policies animating them. *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832, 838, 102 S.Ct. 3394, 3398, 73 L.Ed. 2d 1174 (1982). We therefore construe preemption generously, and may find preemption even if Congress has not expressly stated an intention to preempt state law. *Id.*

Yakima Nation is correct that many of these statutes, *see, e.g.,* Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* (1982); *Indian Child Welfare Act of 1978,* 25 U.S.C. § 1901 *et seq.* (1982); Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.* (1982), embody and advance a broad federal policy of recognizing Indian sovereignty and encouraging tribal self-government. *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334-35 & n. 17, 103 S.Ct. 2378, 2386-87 & n. 17, 76 L.Ed.2d 611 (1983). Others facilitate and encourage tribal management of Indian resources. Of particular note, the Indian Self-Determination and Education Assistance Act, 25 U.S.C.

§ 450 *et seq.* (1982 and Supp. III 1985), authorizes the Secretary of the Interior, upon a tribe's request, to enter into a contract with the tribe, to reallocate management of land use programs involving trust land, including zoning, from the federal government to the tribe. 25 C.F.R. § 271.32 (1986). These statutes may not establish the "comprehensive and detailed federal involvement in or regulation of the particular tribal activity," *Chemehuevi Indian Tribe v. California State Bd. of Equalization,* 800 F.2d 1446, 1448 (9th Cir. 1986), *cert. denied,* — U.S. —, 107 S.Ct. 2184, 95 L.Ed.2d 840 (1987), necessary to find federal preemption, that existed in *Bracker,* 448 U.S. at 145-48, 100 S.Ct. at 2584-86, or in *Segundo,* 813 F.2d at 1392-94. At a minimum, however, they embody a federal policy that informs our inquiry concerning the reach of Indian sovereignty.

2. *Tribal Authority*

Before we may consider Yakima nation's interest in regulating non-member fee land, we must determine whether it possesses the requisite regulatory authority. The Supreme Court has long recognized the inherent "attributes of sovereignty [in Indian tribes] over both their members and their territory." *Iowa Mut. Ins. Co. v. LaPlante,* — U.S. —, 107 S.Ct. 971, 975, 94 L.Ed.2d 10 (1987) (quoting *United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975)). Yakima Nation derives authority not only implicitly from its status as a dependent sovereign, but explicitly from the Treaty with the Yakimas, 12 Stat. 951, 2 Kapplers 524 (1855), in which Yakima Nation and the United States agreed that Yakima

Nation reserved to itself and was guaranteed a right to its "own government" and its "own laws."

Tribal authority extends to regulation over the activities of non-Indians on reservation lands. *Iowa Mutual,* 107 S.Ct. at 978. Such authority, however, is more limited than that over Indians. The Supreme Court has, without apparent consistency, applied two tests to determine the limit on tribal authority over the conduct of non-Indians. In *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court held that tribal sovereignty is divested only when its exercise is inconsistent with overriding federal interests. "[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Id.* at 154, 100 S.Ct. at 2081. Nine months later, the Supreme Court in *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), reiterated language disregarded by *Colville,* that Indian tribes have been implicitly divested of their sovereignty to regulate relations between the tribe and nonmembers by virtue of their dependent status. *Id.* at 563-64, 101 S.Ct. at 1257-58 (citing *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)). The Court held that the "exercise of tribal power beyond what is necessary to protect tribal selfgovernment or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* 450 U.S. at 564, 101 S.Ct. at 1258.

The *Montana* Court identified two exceptions to the limitation on tribal regulatory authority over non-members. The exceptions stem from inherent tribal authority

over the tribe's members and to manage its territory as well as the power to exclude non-members from its reservation. *Anderson,* 736 F.2d at 1364; *Babbitt Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587, 592 (9th Cir. 1983), *cert. denied,* 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984). A tribe retains authority to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements." *Montana,* 450 U.S. at 565, 100 S.Ct. at 1258. A tribe also retains inherent regulatory authority over the conduct of non-Indians on fee land when the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 100 S.Ct. at 1258 (the "tribal interest" test).

[3] Yakima Nation asserts that we should apply the *Colville* test and hold that it has authority to zone non-Indian fee land under that test. Because we conclude that Yakima Nation has authority under the more stringent tribal-interest test employed in *Montana,* we need not determine whether the *Colville* analysis is appropriate to determine tribal authority over non-Indians.[1]

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[1]Most of our cases have applied the *Montana* test, without referring to the conflicting language in *Colville,* to determine whether a tribe has the power to regulate non-Indians within reservation boundaries. *See, e.g., United States v. Anderson,* 736 F.2d 1358 (9th Cir. 1984); *Babitt Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587 (9th Cir. 1983), *cert denied,* 466 U.S. 926, 10 S.Ct.1707, 80 L.Ed.2d 587 *cert. denied,* 466 U.S. 926, 104 S.C. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir.), *cert. denied,* 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 2277 (1982) We did, however, apply both tests in *Confederated Salish and Kooteenai Tribes v. Namen,* 665 F.2d 951 (9th Cir), *cert. denied,* 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed. 2d 291 (1982)

We recently held that "[i]t is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands." *Segundo*, 813 F.2d at 1393 (holding that a city could not apply its rent control ordinance in conflict with tribal ordinance to non-Indians on reservation trust land)). Zoning, in particular, traditionally has been considered an appropriate exercise of the police power of a local government, precisely because it is designed to promote the health and welfare of its citizens. *See Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation*, 670 F.2d 900, 903 (10th Cir. 1982); *see generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). By enacting zoning ordinances, a tribe attempts to protect against the damage caused by uncontrolled development, which can affect all of the residents and land of the reservation.[2] Tribal zoning is particularly important because of the unique relationship of Indians to their lands. Comment, *Jurisdiction to Zone Indian Reservations*, 53 Wash.L.Rev. 677, 680 (1978). Further, a major goal of zoning is the "systematic and coordinated utiliza-

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[2]The Yakima Nation's Code sets out its purpose:

The controls as set forth in this ordinance are deemed necessary in order to encourage the most appropriate use of the land; to protect the social and economical stability of residential, agricultural, commercial, industrial, forest, reserved and other areas within the reservation, and to assure the orderly development of such large areas; and to obviate the menace to the public safety resulting from the improper location of buildings and the uses thereof, and the establishment of land uses along primary highways in such a manner as to cause interference with existing and proposed traffic movement on said highways; and to otherwise promote the public health, safety, morale and general welfare in accordance with the rights reserved by the Yakima Indian Nation.

tion of land" in a particular area. N. Williams, *American Land Planning Law*, § 1.06 (1974), *cited in* Comment, 53 Wash.L.Rev. at 679. Comprehensive planning enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses in a desirable pattern. *Id.* at § 1.08, *cited in* Comment, 53 Wash. L.Rev. at 685. Yakima Nation has exclusive authority to zone tribal trust land, which constitutes nearly all of the closed area and over half of the open area. Although the fee land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checkerboard pattern. If we were to deny Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme. This we are unwilling to do.

3. *Balance of Interests*

Having concluded that Yakima Nation has the authority to zone non-Indian fee land within the reservation boundaries, we must consider whether the interests of Yakima Nation, as shaped by federal policy, outweigh those of the County. We review the district court's findings of fact, including its balancing of the interests, under a clearly erroneous standard.

A. *Whiteside I*

[4] In addition to its general interest in asserting political authority—an interest that, as noted above, federal policy seeks to advance—Yakima Nation has a significant interest in zoning the closed area of the reservation. To protect grazing, forest and wildlife resources, Yakima

Nation restricted the closed area to its members and permittees in 1954 and the Bureau of Indian Affairs restricted use of federally maintained roads in the closed area in 1972. The closed area is relatively undeveloped, with no permanent residences in the Yakima County portion of the area, and residences in other portions predate the zoning ordinance. The closed area, which is about two-thirds forested, provides substantial economic support to the tribe through timber operations, and supplies many Yakima Nation members with a food supply. Its religious and spiritual value also motivates the Yakima Nation's protection of the closed area from development.

The district court found that the Brendale development would cause disruption of Yakima Nation's interests. Construction and use of roads and cabins would cause soil disturbance and erosion, deterioration of ambient air quality, change of water absorption rates and draiange patterns, destruction of some trees and natural vegetation, likely alteration of migration patterns of deer and elk, increased noise levels and thicker population density. Development would necessitate new police and fire services.

The County's zoning classification, if applied, would permit the construction of such structures as single family dwellings, commercial campgrounds, overnight lodging facilities with less than six units, restaurants, and bars in the restricted area. The imminence of such construction is suggested by the fact that Brendale, himself, has stated he intends to build other developments on land adjacent to the property which is the subject of this suit. The district court's recognition of Yakima Nation's concern with maintaining the character of the closed area indicates that

the court properly focused on Yakima Nation's interest in regulating the entire closed area, including the Brendale property.[3]

By contrast, Brendale has not identified any interest the County has in regulating the closed area. The district court noted that the only interest asserted by the County was a general interest in providing regulatory functions to its taxpaying citizens. Further, Brendale has not argued that the Yakima Nation's regulation of the closed area has an effect outside the boundaries of the reservation.[4]

We conclude that the district court properly found that the County is precluded from zoning fee land within the closed area because the County's interest in imposing its regulation is outweighed by the significant interests of Yakima Nation.

B. *Whiteside II*

Yakima Nation has alleged a number of justifications for regulating the open area and in particular the Wilkin-

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[3]Brendale points out that Yakima Nation constructed a permanent structure of twelve dormitory cabins and two larger buildings in the closed area. Even if Brendale's development would have no greater impact on the closed area than the Yakima Nation's structure, a question the district court never considered, we believe the proper analysis addresses the multiplied burden of potential additional development that could occur if the Yakima Nation zoning ordinance were revoked.

[4]Perhaps noteworthy, the County, itself, did not join Brendale in appealing the district court's decision.

son property.[5] The County, by contrast, has not suggested any off-reservation interest in imposing its zoning code on fee land within the reservation. *See Mescalero Apache,* 462 U.S. at 336, 103 S.Ct. at 2387 ("The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. Thus a State seeking to impose a tax on a transaction between a tribe and nonmembers must point to more than its general interest in raising revenues. A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention.") (citations omitted).

[5] We conclude, however, that for this court to weigh the varying interests at this time would be premature. Because the district court found that Yakima Nation lacked the authority to zone fee land owned by non-Indians within the open area, it did not make findings of fact concerning the interests asserted, nor did it bal-

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[5]As alleged, Yakima Nation's interest in controlling land use in the open area, although obviously less compelling than that in the closed area, appears also to be strong. The open area is largely used for agriculture, upon which many tribal members depend for their livelihood. Specifically with regard to the Wilkinson property, Yakima Nation has asserted that the proposal would require the construction of new roads and could alter the flow and quantity of ground water. Yakima Nation alleges that there is a substantial danger of severe erosion and runoff from the subdivision and that the comtemplated change in the land use of the Wilkinson parcel and development of the surrounding area, would interfere with Yakima Nation's interest in the integrity of its culture and way of life. Sacred burial grounds are located in the area. Finally, Yakima Nation alleges that increased development would require additional police services.

ance the federal, tribal, and state interests. We therefore remand to the district court the issue of whether the interests of Yakima Nation, as shaped by federal policy, outweigh the interests of the County in imposing zoning ordinances on fee land owned by non-Indians in the open area.

CONCLUSION

The district court's judgment in *Whiteside I* is affirmed. Its judgment in *Whiteside II* is reversed and remanded.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, Plaintiff, vs. JIM WHITESIDE, GRAHAM TOLLEFSON, CHARLES KLARICH, RICHARD ANDERWALD, PHILIP BRENDALE and FRANK GLASPEY, Defendants.	NO. C-83-604-JLQ February 2, 1984 Yakima, Washington 4:30 o'clock P.M.

ORAL DECISION

The Honorable Justin L. Quackenbush,
Judge.

APPEARANCES:

On behalf of the Plaintiff:
HOVIS, COCKRILL, WEAVER & BJUR
By: JAMES B. HOVIS
Attorney at Law
316 North Third St.
Yakima, WA 98907

On behalf of Defendants Whiteside, Tollefson, Anderwald and Klarich:
OFFICE OF THE PROSECUTING ATTORNEY
By: JEFFREY C. SULLIVAN
Yakima County Courthouse
Yakima, WA 98901

On behalf of the Defendants Brendale and Glaspey:
FLOWER & ANDREOTTI
By: CHARLES C. FLOWER
Attorney at Law
303 East "D" Street
Yakima, WA 98901

FEBRUARY 2, 1984
AFTERNOON SESSION.

THE COURT: In this case and during the trial of this case I believe it was yesterday afternoon, I suggested to the parties that it appears to me that a reasonable resolution of this matter would be or could be accomplished by a rational, dispassionate discussion of the issues between the parties. That, obviously, has not taken place throughout the history, the relatively short history of this matter. Therefore, it is incumbent upon me to, one, find the facts in this case, which I will do, and secondly, to apply the law as it exists to those facts and in that way determine this matter.

My preference as to a resolution without the necessity of this litigation have nothing whatsoever to do with my decision in this matter. Obviously, I would prefer a reasonable compromise between the parties. I will decide the case without any regard whatsoever to what my

preferences would be. I have an obligation and I took an oath to decide the case based upon the law of the land. This action by the Yakima Indian Nation seeks to restrain the proposed residential development by Mr. Brendale in the closed or timbered section of the Yakima Reservation. The county, without passing upon the merits of the individual proposal, has determined that it has jurisdiction over this land, and, therefore, the authority to issue the appropriate ordinances and/or permits to Mr. Brendale if, in their discretion, the county commissioners determine that the proposed development after consideration of an EIS, which they have required, is an appropriate one.

I'm sure it is clear to counsel, but I want it made clear to the parties and to others in attendance, that this decision is limited to the Brendale property and the property within the closed area of the Yakima Reservation.

I accept the line as shown on the exhibit that we have utilized. The question of jurisdiction in the area to the east of the closed area is the subject of another action pending in this court, which is to be heard by this court in March. I will decide that case based upon the individual facts presented to the court during that trial. I am going to decide this case based upon the record that has been made this week in this individual case.

The issues raised in this action involving the closed area of the Yakima Reservation requires an analysis by me of the inherent powers retained by the Tribe as opposed to those powers of the Tribe of which they have been divested. This action involves the issue of the power of the Tribe to regulate land use rather than any claim by

the Tribe to regulate persons on their fee land such as a claim of criminal jurisdiction which we all acknowledge was decided in *Oliphant;* to-wit, that the Tribe does not have criminal jurisdiction over non-Indians.

The Yakima Indian Reservation was established in 1855 by treaty. A treaty is, in fact, a form of a contract or agreement. Both sides, the United States of America and the Indian Nation, are bound by the terms of the treaty or contract. The Tribe in that treaty gave up their rights to their millions of acres of land to which they laid claim in exchange for the promises which were made by the United States of America. It is recognized and established that Congress has the right to alter the terms of the treaty and, in fact, as I suggested during argument, could terminate the very existence of this or any other Indian reservation, but only after paying just compensation.

The history of the dealing by Congress with the Tribes after treaties, after the United States had entered into agreements causes many people great concern. Congress went from the position of an agreement or a treaty to one of assimilation, to one of the Dawes Act of allotments, on then to the somewhat recent philsophy of termination, and now it seems we have come full circle back to a philosophy of soverign immunity. Those matters, of course, are political decisions for Congress. I, of course, am bound by the acts of Congress as interpreted by the courts of the United States.

Despite this history, the Indian Tribes have long been recognized as soverign entities possession attributes of sovereignty over both their members and their territory.

This sovereignty, however, is not absolute. The Tribe is limited by the terms of the treaty. The Tribe is limited by the laws as passed by Congress, and to some extent the Tribes are also limited by their dependent status. As a result of this, the Tribes no longer possess the full attributes of a sovereignty.

It is undisputed that the Indian Tribes have jurisdiction over Indians on their reservation. It is undisputed that the Tribes, likewise, have jurisdiction over the Indian lands. The most difficult and unanswered, in my opinion, jurisdictional question is that before the Court: The question of the power of the Indian Tribes to regulate fee lands owned by non-Indians, which lands, fee lands, are located within the boundaries of an Indian reservation.

I feel that the law is clear that Indian Tribes retain the inherent power to exercise some form of civil jurisdiction over non-Indians on the reservation. This power, however, is limited as is set forth by the numerous decisions of the Supreme Court and the appellate courts. In this case, I must follow the teachings of the United States Supreme Court.

One of its most recent decisions is the New Mexico case, *New Mexico v. Mescalero Apache Tribe* decided by the United States Supreme Court on June 13th of 1983. In that case, the Court recognized that there must be a demarcation of the spheres of jurisdiction as between state or local and tribal authority in and on Indian reservations. The Court pointed out that the United States Supreme Court has continued to stress that Indian Tribes

are unique aggregations, once again possessing attributes of sovereignty over both their members and their territory. Under some circumstances, a state or local government may exercise concurrent jurisdiction over non-Indians on tribal reservations; however, that authority may only be asserted if, in fact, there is some showing of a legal basis as argued by counsel for the defendants; to-wit, Public Law 280, and only if that authority of the Tribe has not been preempted by the operation of Federal law, and also that the authority of the state or local government has not been preempted by Federal law.

In this case, I have determined that Public Law 280 does not preempt the exercise by the Tribe of its authority over the land here in question located in the closed area. Much discussion and debate has taken place concerning the case of *Montana v. The United States,* but that decision came down from the Supreme Court in 1980. The subsequent decisions of the United States Supreme Court have not retreated from the language found in that case; to-wit, that a Tribe may and does retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

In my opinion, the cultural needs and the culture itself of the Yakima Indian Nation as presented in this case clearly establish that the cultural interests, whether they be associated with the religious interests or not, are strong as they relate to the closed area in the Yakima Indian Reservation.

I adopt the findings of the county commissioners at the time of the hearing on the declaration of non-significance. Clearly the action proposed by Mr. Brendale is to take place in the center of a large undeveloped forest. I asked Mr. Brendale and invited, I'm sure, testimony, if it was available from counsel, as to whether or not within the closed area other than the structures, the permanent structures erected by the Tribe for its specific uses, if there was a permanent residence on fee land within the closed area. Evidently, none exist within Yakima County, which I find from the evidence and testimony of Mr. Williams comprises 740,000 acres in the closed area in Yakima County. There are 25,000 acres of fee land within the closed area in Yakima County. Eighteen thousand acres of that fee land is owned by the St. Regis Lumber Company. Based upon those figures, which I find to be true, ninety-seven percent of the land within the closed area is non-fee land; to-wit, either Indian owned or trust lands. Utilizing the 18,000 acres of fee land owned by St. Regis, that would leave some 7,000 acres, or one percent of the land not owned by either the Tribe or allottees, or the St. Regis Lumber Company.

I adopt the findings of the Board of County Comissioners set forth in Exhibit 7. Since I intend to finalize this decision by way of a written opinion, I will not recite those specific items at this time.

I further find from the testimony that this area is one of great value, not monetarily necessarily, but culturally and historically and religiously to the Yakima Indian Nation and to the individual members of both young and old.

I conclude and I find that the development of the Brendale property for residential uses is completely incompatible with the uses to which the Tribe has put its land since, in fact, the treaty and before then. I find that the logging of the land is in the manner in which the Tribe is harvesting the timber is not inconsistent whatsoever with the deep feeling that the members of the Tribe have concerning this closed area. Based upon those findings and the other findings which I will incorporate in the written opinion, I find that in fact the prongs or tests set forth in the *Montana* case have been met by the Tribe.

I find that development within the closed area in a manner such as proposed by Mr. Brendale is completely inconsistent with the political integrity, the economic security, and particularly the health and welfare of members of the Yakima Tribe, who, I find to, in fact, rever this area as being the land of their ancestors. I, therefore, find that the Yakima Indian Nation has the authority to require compliance with the zoning code of the Yakima Indian Nation.

With regard to the Public Law 280 argument, I agree thoroughly with you, Mr. Sullivan, that we would have had a bright line if someone, and it's difficult for me to believe that it wasn't raised in *Cardin vs. DeLaCruz,* if someone would have raised the issue when it was ripe on the *Cardin* issue, but it was not raised, I must make the decision and I am satisfied that Public Law 280 did not, in fact, divest the Tribe of their inherent right to manage or to apply their zoning code to the very limited fee land owned by non-Indians in the closed area under

these facts and circumstances. This is a unique case. I question if there is another area such as this in view of the prior policy, that somewhat vacillating policy from Congress towards the Indians that has a forested area, an area of cultural significance with the roots and berries and the artifacts which I find are important matters, cultural matters, religious matters to the Indian Tribe that has this limited amount of fee land.

With regard to the question of concurrency; to-wit, does Yakima County have the authority to concurrently impose their zoning ordinance in this case on the closed area, as I have indicated there are some circumstances whereby a state may exercise concurrent jurisdiction, and a strong argument can be made that by reason of Public Law 280 whereby Congress gave the state of Washington civil and criminal jurisdiction that the state and the local governments have, in fact, concurrent jurisdiction. However, the analysis does not stop there.

Even with Public Law 280, I believe that the sovereignty which the Tribe has over the lands within their boundaries, and in this case within the closed area, are such that the analysis must follow as to whether or not the Public Law 280 jurisdiction or the local jurisdiction has been preempted by Federal law. This determination, the question of preemption, cannot be made upon the usual mechanical analysis of the basic principles of preemption.

In cases of the Supreme Court and of the Circuit Court of Appeals, the analysis does not stop at the question of state law versus Indian Tribes. The *Bracker* case cited to the Court by counsel recognizes the unique historical origins of Tribes which are recognized, and the unique historical origins of those Tribes' sovereignty and the Federal commitment to Tribal self-sufficiency make it, ". . . treacherous to utilize only those basic notions of preemption." Those cases have, in fact, rejected a very narrow focus on congressional intent, and those cases have also rejected the proposition of preemption requiring an express congressional statement to that effect; that, to-wit, under these circumstances state or local authority is preempted.

The exercise of state or local authority which imposes additional burdens upon the Tribe must ordinarily be justified by the functions or services to be performed by that local government or by that state in the exercise of its alleged on reservation jurisdiction. This requires the court to analyze the reasons claimed by the local government for its attempt to exercise the regulatory function.

In this case, I find that the county has failed to identify regulatory function or service that would justify the assertion by the county of concurrent regulatory authority. I likewise find that the county has failed to point to any off reservation effects that would warrant intervention by the county in the imposition of the county zoning ordinance on this property located in the middle of a 740,000 acre undeveloped tract. For those reasons, I find that Federal law preempts the exercise or the imposition of the county zoning ordinance upon fee land owned by non-Indians located within the closed area of the Yakima Indian Reservation.

As indicated, I will place my decision in final written form; however, before we get to that final aspect of this

case, we have the 1983 claim, and in view of the amendment, the qualified immunity claim and affirmative defense set forth by Mr. Sullivan. I will allow you, Mr. Hovis, fifteen days to respond, and do you want to be in a position of responding at this point, Mr. Flower, or would you prefer to reply with Mr. Sullivan?

MR. FLOWER: We would like to respond, Judge.

THE COURT: All right. I will allow you fifteen days, and I'll allow you ten days to reply, Mr. Sullivan.

MR. SULLIVAN: Thank you, your Honor.

THE COURT: I might say, as you know we alternate three or four months at a time coming here to Yakima, and we start back in March. What is the date?

THE CLERK OF THE COURT: The 19th.

THE COURT: It may well be if you desire to argue the 1983 issue, the entitlement of the Tribe to damages, we should be in a position of being able to accomodate you during that week of the 19th, if anyone wants argument.

MR. FLOWER: Unless the laws have changed and are different, I don't think there would be any need to. Obviously, I think on March 19th, I'll be here anyway, and so will Hovis.

THE COURT: What is that?

MR. FLOWER: Whiteside II.

THE COURT: Whiteside II is in May.

THE CLERK OF THE COURT: Pretrial conference is in April and the trial is in May.

THE COURT: Well, be here if you wish to argue the 1983 issue.

Pending the written decision which I will prepare in this matter, and I recognize, Mr. Flower, that you would like to move this matter along and get the final order entered, but I do need to make the decision on the 1983 civil rights portion. I would hope that I would be in a position to have that done by the time we are back here in March. But, if either side wants an oral argument on the 1983 issue, notify Mrs. Buckner within fifteen days. You can do it in your brief. If you just specify oral argument waived or requested, and if you would do that, too, Mr. Flower.

MR. FLOWER: Surely.

THE COURT: And if you wish argument, Mr. Hovis, if you just send a letter to the Clerk as to oral argument.

MR. HOVIS: Thank you, your Honor.

(Whereupon, hearing was concluded in this matter at 5:00 o'clock, P.M., February 2, 1984.)

CERTIFICATE

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

I, Mia M. Bohn, RPR, do hereby certify that I am an Official Court Reporter in the United States District Court;

That as such Official Court Reporter, I atended the proceedings in the foregoing entitled matter;

That I took down in shorthand all oral testimony adduced and proceedings had;

That such shorthand was reduced to writing under my supervision;

That the foregoing pages of typewritten matter contain a true and accurate excerpt of proceedings taken from my shorthand notes as aforesaid.

/s/ _____
MIA M. BOHN, RPR
Official Reporter
U.S. District Court
Eastern Dist. of Wash.
Spokane, Washington

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT O FWASHINGTON

YAKIMA INDIAN NATION,	)	
Plaintiff,	)	NO. C-83-604-JLQ
vs.	)	MEMORANDUM OPINION
WHITESIDE, et al.,	)	
Defendants.	)	

The Yakima Indian Nation (Yakima Nation) brought this suit seeking a declaratory judgment and injunction barring the defendants from taking or permitting any land use within the "Closed Area" which is contrary to the Amended Zoning Regulations of the Yakima Nation (Yakima Nation Code). The named defendants are the Yakima County Commissioners, the Director of Yakima County Planning Department, and Philip Brendale, record owner of fee land within the exterior boundaries of the Yakima Indian Reservation (Reservation).[1] Specifically, the plaintiff seeks to impose its zoning and land use law on a development proposed by defendant Brendale within the so-called "Closed" area of the Reservation. Additionally, the Yakima Nation seeks the court to limit Yakima

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[1] In addition to those defendants, the complaint also named Frank Glaspey, codeveloper of the proposed Brendale property development. By court Order dated February 10, 1984, defendant Glaspey was dismissed with prejudice. (Ct. Rec. 127).

County's regulatory authority over this property to the extent that the County's laws would allow land uses inconsistent with those permitted by the plaintiff. In other words, the plaintiff seeks a judicial declaration that its regulatory jurisdiction over Brendale's property is paramount and exclusive.

The plaintiff's complaint also contains allegations of civil rights deprivations. More particularly, the Yakima Nation contends that the County's assertion of its zoning jurisdiction over the Brendale property violated Section 1 of the Civil Rights Act of 1871. (Codified at 28 U.S.C. § 1983).

The court has previously entered both a Temporary Restraining Order and a Preliminary Injunction which restrained defendant Brendale from changing the land use of the subject property (Ct. Rec. 12, 42). Thereafter, a four day trial was held and at its conclusion the court ...ered an oral decision favorable to the plaintiff.[2] (Ct. Rec. 128). What follows is the court's written opinion including its Findings of Fact and Conclusions of Law. This written opinion shall supplement the court's oral opinion.

FACTUAL BACKGROUND

The Yakima Indian Nation is a composite of fourteen (14) originally distinct Indian tribes who banded together in the mid-1900's for the purpose of negotiating with the

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[2] The court's oral decision encompassed only the plaintiff's request for a declaratory judgment on the regulatory jurisdiction issue. The Yakima Nation's Section 1983 claim was expressly excluded from the oral decision but is addressed in this written opinion.

United States. Pursuant to a treaty signed in 1855 and ratified in 1869, 12 Stat. 951, these various tribes ceded vast areas of land but also reserved an area for their "exclusive use and benefit". This reserved area is the Yakima Nation Indian Reservation (Reservation).

The Reservation is located in southeastern Washington. It's exterior boundary encompasses approximately 1.3 million acres of land. Of this amount, about eighty percent of the land is held in trust by the United States for the benefit of the Tribe or its individual members (trust lands). The remaining land is held in fee by Indians or non-Indian owners (fee land). The majority of this fee land lies within the three incorporated towns in the northeastern part of the reservation—Toppenish, Wapato and Harrah. The remainder is scattered throughout the reservation creating the now familiar "checkerboard" effect. The fee lands fall within the boundaries of Klickitat, Lewis and Yakima Counties.

Most of the trust land lies within the Reservation's "Closed Area". This area occupies essentially the western two-thirds of the Reservation. It covers approximately 807,000 acres, 740,000 of which fall within Yakima County. Of this latter figure, 25,000 acres are fee land. The Closed Area is predominantly forested (about two-thirds), the balance being classified as range land. The topography of this area varies from the gently sloping range land along its eastern edge, to deep river valleys in the central part and finally to the mountain peaks of the Cascade Range along its western boundary. A state-maintained highway, U.S. 97, cuts across the southeastern portion of the area and several Bureau of Indian Affairs

(BIA) maintained arterials provide access to the closed area's interior.

Apart from the "exclusive use and benefit" language in the treaty, it is unclear when the "Closed Area" was officially declared off-limits to the general public. It is undisputed that by Tribal Resolution dated August 11, 1954, the area was declared "to remain closed to the general public" to "protect the [Closed Area's] grazing, forest and wildlife resources." Entry into the area was restricted to enrolled members of the Yakima Tribe, official employees, permittees and persons with bona fide business and property interests. Access to the area was further limited when, in May 1972, the BIA restricted the use of the federally maintained roads within the Closed Area to Tribal members and permittees who were either record land owners or associated with the Yakima Nation through employment, business, or in some way directly benefitting the Yakima Nation.[3]

The Yakima Nation currently has a Courtesy Permit System which has expanded the original categories of permittees to include spouses and dependents of enrolled members, plus special groups or dignitaries visiting the reservation. For the stated purpose of the "protection and enhancement of its [Closed Area] natural resources, natural foods, medicines, game wildlife, [and] environ-

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3 Defendant Brendale judicially challenged this closure on equal protection grounds but the court concluded no violation occurred. *United States v. Philip Brendale, et ux,* C-74-197 (E.D. Wash. Aug. 27, 1974) (memorandum decision). In a later action, however, Mr. Brendale was granted an easement by necessity. *Brendale v. Olney, et al.,* C-78-145 (E.D. Wash. Mar. 2, 1981) (memorandum decision).

ment . . ." the permitted uses are limited to sightseeing, hiking, camping and tribal, BIA, or family related business or activity. Permittees (*i.e.* non-tribal members) are specifically prohibited from hunting, fishing, boating, drinking, operating vehicles off established roads, camping at other than designated campsites and removing flora, fauna, petrified wood, other valuable rocks or minerals or artifacts. Ingress and egress is monitored and controlled by four tribally-operated guard stations. Tribal police and game officers patrol the interior of the area.

Tribal Land Use Regulations:

In October 1970 the Yakima Nation instituted its first zoning Ordinance. That ordinance was a six-page Tribal Resolution modeled after a similar Yakima County ordinance. The Zoning Ordinance designated all areas within the exterior boundaries of the reservation, both trust and fee lands (except the incorporated cities and towns) as being within the General Use District. All otherwise lawful uses were generally permitted except certain activities requiring a conditional use permit. *E.g.,* asphalt mixing plants, junk yards, certain feedlots, above ground storage tanks, etc. The Board of Adjustment, composed of all the members of the Tribal Council, sat as the Board of Appeals from administrative decisions and the Hearing Board for conditional use applications. Its decisions were final tribal action.

In May 1972, the Yakima Nation adopted a new zoning law, the Amended Zoning Ordinance, which remains in effect today. Like its predecessor, the Amended Zoning Ordinance expressly is made applicable to fee land. Besides that similarity, this twenty-seven page document re-

sembles the original ordinance only in the composition of the Board of Adjustments and its function. Otherwise, it is much more detailed and comprehensive. Among other things, it establishes a requirement for building permits, minimum lot sizes, authorizes the establishment of Planned Development Districts, provides for Special Use Permits and creates five categories of Use Districts. These Use Districts are: Agricultural, Residential, Commercial, Industrial, and Reservation Restricted Area.

The Reservation Restricted Area is another term for the Closed Area. It was established as a "special use district" to insure continuation of the Tribal natural resources and to insure the Treaty right of tribal members to have an area in which they can camp, hunt, fish, and gather roots and berries in the tradition of their culture. Within this district only the following uses are permitted:

1. Harvesting wild crops;
2. Grazing, timber production or open field crops;
3. Hunting or fishing by Tribal members;
4. Camping in temporary structures;
5. Tribal camps for the education and recreation of tribal members;
6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of tribal resources;
7. No building or other permanent structure or any appurtenances thereto other than those allowed in Sections 1-6 above shall be allowed in this district;
8. Any structure which is authorized in Sections 1-6 above shall be set back 200 feet from any waterway.

These limited uses are the primary source of the present action.

Yakima County Land Use Regulations:

As early as 1946 the County of Yakima regulated land use within its boundaries. This regulation was, however, not extensive until 1965 when the county adopted its first zoning ordinance which, as stated previously, was the model for the Yakima Nation's initial zoning ordinance.

The present comprehensive zoning regulations, The Yakima County Code, was first enacted in 1972. It was struck down for a procedural defect, but readopted in its same form in October, 1974. Within its seventy-two pages, the Yakima County Code identifies numerous specified use districts which generally regulate agricultural, residential, commercial, industrial, and forest-watershed uses. In the reservation area, the official county zoning map segregates the fee lands from the trust lands. The county does not apply its zoning law to trust lands.

The fee lands within the Closed Area are zoned "forest watershed". This designation allows a diversity of uses including, for example, single family dwellings; commercial camp grounds; overnight lodging facilities having less than sixteen (16) units; restaurants, bars; general stores; souvenir shops; service stations, marinas, saw mills and the construction of dams for the production of electricity. The minimum lot size for this use district is one-half acre, but the average size of any subdivision or short plat must be two acres. The stated purpose for the Forest-Watershed District is to facilitate land and water conservation while accommodating residential, recreational and commercial uses.

In addition to its comprehensive zoning regulations, Yakima County has other land use regulations applicable

to fee land within the county. Its 1974 Subdivision Ordinance imposes standards for streets, water, sewage, drainage, parks and recreation areas, and school sites. The Yakima County Shoreline Master Program, adopted in 1974 as mandated by state law, regulates certain activities adjacent to shorelines. Also as a participant in the federal flood insurance program the county attempts to control flood plain development, although it is not clear whether any Closed Area fee lands lie within an identified flood plain. Another of Yakima County's state-mandated land use regulations is its Environmental Ordinance which requires a review of the potential environmental impact of all non-exempt land use actions. None of the above-described regulations have been applied to trust lands on the Yakima Nation Reservation.

The Brendale Property:

Defendant Brendale owns a 160 acre tract of fee land approximately in the center of the forested portion of the Closed Area.[4] The 160 acre parcel was originally allotted to Brendale's great aunt, a member of the Yakima Nation, and later inherited by Brendale's mother and grandfather who were issued a fee patent in 1963. At his mother's death in 1972, the fee parcel passed to Philip Brendale.

In January, 1982, Philip Brendale filed four contiguous short plat applications with the Yakima County Planning Department. In compliance with the Environmental Ordinance, Mr. Brendale submitted an Environmental

[4] Although Philip Brendale is partially of Indian blood, he is not a member of the Yakima Nation as his blood quantum apparently is not sufficient to entitle him to enrolled status in the Yakima Nation.

Checklist from which the planning department could assess the potential impact of his proposed development and decide whether an Environmental Impact Statement (EIS) was warranted. Having determined that the short platting did not require an EIS because it would not significantly affect the environment, the planning department issued a "Declaration of Non-Significance". Thereafter, the department notified interested parties, including the Yakima Nation, of its determination and requested comments. At the end of the comment period, during which no reply from the Yakima Nation was received, the short plats were approved.[5]

Approximately one year later, in April 1983, Mr. Brendale submitted a long plat application to divide one of his newly platted twenty-acre parcels into ten two-acre lots. He indicated the lots were to be sold as summer cabin sites, with each site providing its own sewage treatment systems and water supply. After a review of the submitted Environmental Checklist, the County Planning Department issued a Declaration of Non-Significance, thus negating the necessity for an EIS.

Thereafter, the Yakima Nation timely appealed that Declaration of Non-Significance to the Yakima County Board of Commissioners. The grounds for the appeal

[5] Following the approval of the short plats, Mr. Brendale and the Yakima Nation exchanged offers and counteroffers for the sale of his property. Unfortunately, they were unable to agree on a price as the Tribe valued the property in light of the development restrictions imposed on property within the Closed Area by the Yakima Nation zoning regulations and Mr. Brendale valued the property based upon its recreational development potential as permitted by the zoning regulations of Yakima County.

were two-fold: (1) that Yakima County was without authority to regulate the land use of the Brendale property and (2) that the proposed Brendale development would significantly affect the environment and therefore an EIS was required. Hearings on the Tribe's appeal were conducted by the County Commissioners on August 1, 2, 8 and 9, 1983. During the early states of the hearings, the Yakima Nation strenuously argued the regulatory jurisdictional issue but, based upon advice from the County legal department, the Commissioners concluded that the appeal was properly before the Board and limited the appellants to presenting evidence as to the EIS issue only. Following hearing testimony from county and tribal witnesses, the Commissioners reversed the decision of the County Planning Department and ordered the preparation of an EIS. The county was in the early stages of preparing an EIS when the present action was initiated by the Yakima Nation.

In addition to the factual background as set forth above, the court makes the following specific factual findings:

FINDINGS OF FACT

1. The proposed Brendale subdivision concerns the following described real property situated in Yakima County, Washington:

> The Northwest Quarter and Southwest Quarter of the Southwest Quarter of the Northwest Quarter of Section 14, Township 8 North, Range 14 East, W.M.

The property is located approximately 25 miles Southwest of the community of White Swan and is northwest of the Intersection of Tepee Creek and IXL roads.

2. The proposed subdivision is fee patent land located within the exterior boundaries of the Yakima Indian Reservation. The property is within the "Closed Area" of the reservation which is accessible only by members of the Yakima Indian Nation and non-members holding permits from the Tribe or the Bureau of Indian Affairs.

3. The Closed Area covers approximately 807,000 acres, 740,000 of which falls within Yakima County. Of the latter figure, 25,000 acres (or 3.3%) is fee land. The St. Regis Paper Company owns approximately 18,000 of this fee land. The remaining 7,000 fee acres are owned by Indians and non-Indians.

4. The proposed subdivision covers an area of 20 acres and includes ten two-acre lots. The development contemplates the placement of recreational summer cabins and/or travel trailers on the lots.

5. Each lot within the proposed subdivision is to be served by an individual well and an on-site sewage disposal system consisting of a septic tank with drain field or a holding vault. Electricity is to be provided by private generators.

6. The only road access to the proposed subdivision is via Bureau of Indian Affairs roads. The nearest county road is over 20 miles from the project.

Interior access to the lots would be provided by private roads consisting of re-graded existing logging spur roads or newly constructed roads. The roads would be dirt surfaced and would be maintained by a homeowner's association.

7. The proposed 20 acre subdivision is within a 160 acre quarter section owned by Philip Brendale, the North-

west quarter of Section 14, Township 8 North, Range 14 East, W.M. The proposed plat is bordered on the East and North by other lands within the quarter section owned by Mr. Brendale. It is bordered on the South by lands owned in fee by the St. Regis Paper Company and on the West by lands held in trust by the United States.

The quarter section owned by Mr. Brendale is bordered on the South and East by lands owned in fee by the St. Regis Paper Company and on the North and West by lands held in trust by the United States.

8. The subject property and all surrounding lands are forested.

9. There are currently no structures located on the subject property or on the quarter section parcel owned by Mr. Brendale.

10. The current land uses of the surrounding property include hunting and fishing, food gathering, herb gathering (for medicinal and spiritual purposes), timber production and wildlife habitat.

11. The subject property and all surrounding properties are within the Reservation Restricted Area (Closed Area) use district pursuant to the Yakima Indian Nation Zoning Ordinance. The purpose of the Reservation Restricted Area is to "insure continuation of the tribal natural resources and to insure the treaty right of tribal members to have an area in which they may camp, hunt, fish and gather roots and berries in the tradition of their culture". Within the Reservation Restricted Area no private buildings are permitted to be constructed.

12. Road construction and cabin site preparation will cause disruptions, displacements, compactions and/or covering of soil and will change ground surface relief features.

13. The proposal will cause a deterioration of ambient air quality due to vehicle exhaust emissions, dust raised on the interior and exterior access roads, and smoke from individual fireplaces or fires.

14. The proposed cabins and private roads will cause changes in absorption rates and drainage patterns. The proposal may cause deterioration of surface water quality due to runoff from disturbed sites. The proposal may alter the direction or rate of flow of ground water and may change the quantity of ground waters by direct withdrawal from wells. The proposal may cause the deterioration of ground waters through seepage from waste water, garbage and sewer facilities.

15. The proposal will result in the destruction of some trees and natural vegetation due to cabin and road construction. The proposal may result in the introduction of new species of flora into the area through gardens or through inadvertent introduction such as weeds brought in with hay.

16. The proposal will result in the deterioration of existing wildlife habitat due to runoff, road and cabin construction, and the introduction of domestic pets. The proposal is likely to cause a change in the movement patterns of wildlife such as deer and elk due to the subject property's proximity to a wildlife migration corridor.

17. The proposal may result in the increase in the rate of use of fuel wood.

18. The proposal will increase existing noise levels due to human activity, vehicles, and generators.

19. The proposal will produce new light due to the artificial lights associated with human occupancy.

20. The proposal will result in the alteration of the present land use of the area. The proposal is a complete change from the current use of the subject property and adjoining properties. Further, the developer indicates there will probably be future development of lands he owns to the East and North of the subject property.

21. The proposal will alter the location, distribution and density of human population in the area. The Closed Area is uninhabited except for short term or seasonal use.

22. The proposal will result in the generation of additional vehicular movement due to increased traffic on the interior and exterior access roads.

23. The proposal will result in the need for new or altered governmental services in the areas of police and fire protection. The increased fire hazard caused by human occupancy potentially endangers the surrounding forest lands, wildlife, wildlife habitat, water quality, and cultural and historical sites.

24. The location of cabins on the property will inevitably lead to the need for increased police protection to prevent vandalism and to protect residents.

25. The proposal will result in the need for new systems for water, sewage and solid waste disposal.

26. The timber harvested from the restricted lands within the Closed Area is a major source of income for the

Yakima Nation. Approximately 90 percent of the annual Tribal income is derived from the timber harvest.

27. The Closed Area is an integral part of the traditional Washat religion practiced by many tribal members in that it provides a unique place to gather foods and herbs.

28. "Sweathouses" and other places or items of cultural or religious significance are located within the Closed Area. At least one traditionally used "sweathouse" location lies within one to two miles of the subject Brendale property.

29. The Yakima Nation is in the process of expending considerable time and money to develop an extensive big game management program within the Closed Area. Field studies are presently underway which preliminarily show that elk herds migrate through Tepee Creek drainage basin—the location of the Brendale proposed development.

30. A major elk wintering range lies three to five miles from the Brendale property.

31. Mule deer also use the area in the vicinity of the Brendale property as a migration corridor.

32. There are no permanent residences in the Yakima County portion of the Closed Area.

33. The Closed Area of the Yakima Nation is a unique area. It has remained relatively undeveloped. Over the years its forest has provided considerable economic benefits to the tribe; its waters, wildlife, and soil have provided an abundance of food and its protected existence has kept intact the Closed Area's intangible but critical cultural values.

34. The preponderance of the evidence has convinced this court that the Closed Area is an integral part of the Yakima Indian Nation. As such, the Tribe must be able to exercise regulatory control over the area, including the Brendale fee land. To deprive the Yakima Nation of this authority would unquestionably threaten its political integrity, its economic security and the general health and welfare of the tribe and its members.

35. Yakima County's interest in regulating the Brendale property is limited; the only interest articulated by the county was the general interest of providing regulatory functions to its taxpaying citizens. Yakima County does not contend otherwise and the court finds that the Tribe's exercise of its regulatory authority over the fee land will not have effects outside the boundaries of the reservation. In no significant way will the Tribe's regulation of Mr. Brendale's property negatively affect defendant Yakima County.

LEGAL ANALYSIS

The court's legal analysis must focus on two issues: the regulatory jurisdiction question; and, the Yakima Nation's Section 1983 claim.

A. JURISDICTION TO REGULATE LAND USE:

The resolution of the jurisdictional dispute requires a two-step analysis. The court must first decide whether the Yakima Nation has any authority to regulate the activities of Mr. Brendale on his Closed Area fee land. If the tribe does indeed have that power, then the inquiry is whether Yakima County may exercise its concurrent jurisdiction over the same property. Although the two steps

are distinct, there is some overlap in the analytical framework.

1. TRIBAL AUTHORITY: The Montana Test.

Although Indian Tribes possess "attributes of sovereignty over both their members and their territory", *United States v. Wheeler,* 435 U.S. 313, 323 (1975), the dependent status of tribes and their diminished status as sovereigns limits their power in relations between a Tribe and nonmembers of the Tribe. *Id.* at 326. In fact, Indian Tribes have been divested of the power to exercise any criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe,* 435 U.S.1 191 (1978). Similarly, a Tribe's inherent hower to exert civil jurisdiction over non-Indians has been diminished. While a Tribe does possess the power to "exclude nonmembers entirely or to condition their presence on the reservation", *New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. 2378, — (1983), apparently that power may be exercised over non-Indian fee lands only in limited circumstances. *Montana v. United States,* 450 U.S. 544 (1980). Thus, in certain situations a Tribe may "exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands". *Id.* at 565. Unfortunately, the parameters of that power are anything but settled; nevertheless, the Court has provided guidance which is pertinent to the case at hand.

The *Montana* Court identified two situations in which the exercise of tribal civil jurisdiction over non-Indian fee land may be appropriate. The first instance is where a non-Indian, through a business relationship or otherwise, has entered into a "consensual relationship" with the

tribe or its members. *Id.* at 565. Such is not the case here as there is no evidence of any "consensual relationship" between the Yakima Nation and Brendale which would place him within the authority of the Tribe.

The second situation described by the *Montana* Court is where the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe." *Id.* at 566. Thus, absent a "consensual relationship", the critical factual determination which must be made in deciding whether a Tribe may regulate the land use of a non-Indian on fee land is whether the non-Indian's activities pose a threat to the Tribe's political integrity, its economic security or its health and welfare. *Id.* at 565-66; *see United States v. Anderson,* 736 F.2d 1358 (9th Cir. 1984) (tribe lacked power to regulate water use of non-Indian fee landowners within the reservation); *Cordin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982) (building, health and safety regulations applied to nonmember business located on fee lands within the reservation), *cert denied,* 459 U.S. 967 (1982); *Knight v. Shoshone & Arapahoe Indian Tribes,* 670 F.2d 900 (10th Cir. 1982) (tribal zoning ordinance applied to fee land within the reservation); *Colville Confederated Tribes v. Walton,* 647 F.2d 42 (9th Cir. 1981) (tribe allowed to exercise regulatory authority over water use of Non-Indian fee landowners within the reservation), *cert. denied,* 454 U.S. 1092 (1981): *Sechrist v. Quinault Indian Nation,* 9 I.L.R. 3064 (W.D. Wash. 1982); *Lummi Indian Tribes v. Hallover,* 9 I.L.R. 3025 (W.D. Wash. 1982).

As stated in the Findings of Fact, this court finds that Brendale's proposed development does indeed pose a threat

to the political integrity, the economic security and the health and welfare of the Yakima Nation. His planned development of recreational housing places critical assets of the Closed Area in jeopardy. While the danger to the economically important timber production is significant, of paramount concern to this court is the threat to the Closed Area's cultural and spiritual values. To allow development in this unique and undeveloped area would drastically diminish those intangible values. That in turn would undoubtedly negatively affect the general health and welfare of the Yakima Nation and its members. This court must conclude therefore that the Yakima Nation may regulate the use that Brendale makes of his fee land within the Reservation's Closed Area.

Notwithstanding the court's finding that the proposed Brendale development's threatened harm allows the Yakima Nation to exercise civil regulatory authority, the defendants argue that Congress has stripped the Tribe of any such power. Specifically, the defendants contend that when the State of Washington assumed jurisdiction over the Yakima Reservation pursuant to § 6 of the Act of August 15, 1953, 67 Stat. 590 (Public Law 280) (hereinafter P.L. 280) the Yakima Nation was divested of its inherent tribal authority to regulate the activities of non-Indians on deeded land.[6] The gist of their argument is

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[6] WASH. REV. CODE § 37.12.010 provides:

Assumption of criminal and civil jurisdiction by state. The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with

(Continued on following page)

that P.L. 280 was a *grant* of jurisdiction to the state (and therefore the county) which necessarily must have *withdrawn* jurisdiction from the Tribe. This argument is without merit for several reasons.

To begin with, P.L. 280 neither increased nor diminished a state's authority over the reservation activities of non-Indians. In no way can it be construed as a grant of such authority—no such grant was necessary.

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the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.021 [tribal consent] have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and,
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways.

Provided further, that Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chatper 36, Laws of 1963 had not been enacted.

This partial assumption of jurisdiction over Indians (based on the status of the land on which the questioned activity occurred) has been sanctioned by the Supreme Court. *Washington vs. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463 (1979).

Under P.L. 280, states retain the same regulatory jurisdiction over the on-reservation activities of non-Indians "that they enjoyed prior to that Law". *White Mountain Apache Tribe v. State of Arizona,* 649 F.2d 1274, 1279 (9th Cir. 1981). And it is settled law that long before the enactment of P.L. 280, states (and presumably a political subdivision like Yakima County) had the power to assert sovereign powers over the reservation activities of non-Indians. *See, e.g., Draper v. United States,* 164 U.S. 240 (1896); *Utah & Northern R.R. v. Fisher,* 116 U.S. 28 (1885). As discussed *infra,* the only limitations on that power are the independent but related barriers of "infringement on the inherent tribal sovereignty", *see e.g., Williams v. Lee,* 358 U.S. 217 (1959) and the doctrine of "federal preemption". *See e.g., New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. 2378 (1983).

Further evidence that P.L. 280 did not in any way affect the powers of a state over non-Indians is the law's purpose. P.L. 280 was designed to remedy the problem of the lack of state jurisdiction over *Indians* in their dealings (criminal or civil) with non-Indians. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A. Law Rev. 535 (1975). The states needed Congressional authorization to exert power over Indians. No such authorization was needed, however, as to the states' authority over non-Indians. Thus, P.L.280 was *not* a grant to the states of jurisdictional powers over non-Indians. Accordingly, it cannot be construed as supplanting the tribe's authority with state au-

thority[7] or divesting the tribe of whatever inherent power it has over the reservation activities of non-Indians. *See Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982), *cert. denied,* 103 S.Ct. 293 (1983); *Sechrist v. Quinault Indian Nation,* I.L.R. 3064 (W.D. Wash. 1982).[8]

2. *YAKIMA COUNTY AUTHORITY: Preemption.*

Having concluded that the Yakima Nation may exercise its regulatory authority over the Brendale property, the court's inquiry must now focus on whether Yakima County may also exert its authority over the same property, *i.e.* whether Yakima County may exercise concurrent jurisdiction. While it is unquestioned that Yakima County has the authority to exercise jurisdiction over non-Indian activities on the Reservation, *see e.g., New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. 2378 (1983); *Colville Confederated Tribes v. Walton,* 674 F.2d 42, 51-53 (9th Cir.

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[7] Even if P.L. 280 were interpreted as an affirmation or expansion of the state's jurisdiction over non-Indians, it is limited to "civil litigation" and not "general state civil regulatory control" such as zoning. *See Bryan v. Itasca County,* 426 U.S. 373, 384-85 (1976); *Barona Group of Captain Grande Band v. Duffy,* 694 F.2d 1185, 1188 (9th Cir. 1982) (P.L. 280, does not enable California to impose its *regulatory* bingo laws on the reservation); *United States v. City of Humboldt,* 615 F.2d 1260 (9th Cir. 1980) (California municipality may not zone restricted lands); *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1976) (California county may not zone restricted lands).

[8] Both cited cases upheld the Quinault Indian Nation's application of its zoning laws to non-Indian owned deeded lands. The State of Washington exercises the same degree of P.L. 280 jurisdiction over the Quinault Indian Reservation as it does over the Yakima Reservation. *See, Comenout v. Burdman,* 84 Wn.2d 192 (1974). Implicitly then, these two cases must be interpreted as rejecting the notion that P.L. 280 stripped tribes of their civil jurisdictional authority.

1981), *cert. denied,* 454 U.S. 1092 (1981), that power is not boundless. It is limited by the twin barriers of "infringement on tribal sovereignty"[9] and "federal preemption".[10] Although related in concept, these twin barriers are independent and either standing alone may be sufficient to block the county's attempt to assert its power. *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 142. In other words, Yakima County may extend its regulatory authority onto the Yakima Nation Reservation up to the point where it either infringes on the Tribe's inherent authority or where it is preempted by federal law. In this case, where the county seeks to regulate the activities of non-Indians on fee land, the inquiry must focus on the preemption barrier.[11]

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[9] The "infringement" barrier has as its foundation the right of a tribe to exercise traditional governmental functions. The exercise of state authority may be barred if it "unlawfully infringes 'on the right of Indians to make their own laws and be ruled by them'." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980), quoting *Williams v. Lee,* 358 U.S. 217, 220 (1959).

[10] The preemption barrier, on the other hand, is based upon the federal supremacy clause and the federal government's plenary power over Indian Tribes. See, *e.g., Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. 832 (1982); *Central Machinery Co. v. Arizona Tax Comm'n.,* 448 U.S. 160 (1980).

[11] Since the infringement barrier is derived from the right of tribal selfgovernment, it is primarily applicable where intratribal relations are implicated. *White Mountain Apache Tribe v. State of Arizona,* 649 F.2d 1274, 1275 (9th Cir. 1981). Yakima County's Regulation of Mr. Brendale's property does not violate the right of tribal selfgovernment. Concurrent jurisdiction over Brendale's property would require him to comply with the regulations of Yakima County *and* the Yakima Nation. Thus, Yakima County would not be infringing on the Yakima Nation's right to "make their own laws and be ruled by them." *See Washing-*

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When used in the context of Indian law, the doctrine of preemption is applied uniquely. Due to the "historical origins of tribal sovereignty" and the federal commitment to tribal self-sufficiency and self-determination it is "treacherous to impart . . . notions of preemption that are properly applied to other contexts." *Bracker,* 448 U.S. at 143. Unlike preemption in other contexts, Indian law preemption does not require "an express congressional statement to that effect," *Id.* at 144, nor does it even require "a narrow focus on congressional intent to preempt state law". *New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. at 2386. Rather, "state [county] jurisdiction is preempted by federal law if it intereferes or is incompatible with federal and tribal interests reflected in federal law, unless the state [county] interests at stake are sufficient to justify the assertion of state [county] authority." *Id.* at 2386. In other words, a preemption analysis rests principally on a consideration and balancing of the competing federal, county and tribal interests at stake. *Id.* at 2386.

Federal and tribal interests are assessed from a broad perspective. Traditional notions of Indian sovereignty and the federal government's commitment to the promotion and protection of tribal resources and cultural values

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ton v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (state taxation of on-reservation cigarette purchases does not intrude upon or diminish the tribe's authority to also tax); *White Mountain Apache Tribe v. State of Arizona,* 649 F.2d 1274, 1285 (9th Cir. 1981) (state hunting and fishing regulations may be applied to non-Indians on reservations without violating the right of tribal self-government).

are considerations which must be weighed on the preemption scales. *E.g., New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. at 2386-2387; *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832 (1982). On the other hand, an assessment of the county's interest is guided by more narrow and specific considerations. The concept of county sovereignty and general county governmental interests are of limited importance. *See, e.g., Warren Trading Post Co. v. Arizona Tax Comm'n* 380 U.S. 685 (1969). Yet, a state's [county's] regulatory interest will be particularly substantial if the state can point to off-reservation effects that necessitate state [county] intervention." *New Mexico v. Mescalero Apache Tribe,* 103 S.Ct. at 2387; *Colville Confederated Tribes v. Walton,* 647 F.2d at 52-53.

As stated in this court's Findings of Fact, Yakima County's interest in regulating the at-issue Brendale property is minimal. Yakima County conceded that its interest was limited to a general concern of providing regulatory functions to its tax paying citizens. Furthermore, the county did not point to any "off-reservation effects" which the Tribe's regulation of Brendale's property would produce. To the contrary, the county agreed, and this court so finds, that the Tribe's exercise of its regulatory authority over the fee land will not produce effects outside the Reservation boundary. In sum, the court concludes that Yakima County's interests tip the preemption scales only slightly.

On the other hand, the interests of the Yakima Nation weigh heavily on the preemption scales. The Closed Area provides immense benefit to the Yakima Nation. It's timber produces substantial tribal income; its flora and

fauna provide a ready source of subsistence; its sacred areas help sustain the spiritual needs of the tribal members; and its beauty most certainly contributes to the general health and welfare of the Tribe. Those resource and cultural values carry great weight. And, given the unique character of the Closed Area, it is imperative that the Yakima Nation be able to exercise complete control over its use. Accordingly, the court concludes that the interests of the Yakima Nation in exerting its authority over the Brendale property far outweighs the interests of Yakima County; thus Yakima County is preempted from exercising concurrent jurisdiction and the Yakima Nation's jurisdiction over Brendale's property is exclusive.

B. *SECTION 1983: CLAIM*[12]

The basis for the Yakima Nation's civil rights claim are twofold. First, the Tribe asserts that the County Commissioners denied it due process of law by not providing the Tribe a meaningful opportunity to be heard on the jurisdictional issue. Second, the Tribe argues that Yakima County's attempts to exercise jurisdiction over the Brendale property violated rights enforceable under Section 1983. For the reasons discussed below, the court concludes that neither of these two alleged bases of Section 1983 liability has merit.

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[12] 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Assuming that the Yakima Nation is a proper plaintiff in a Section 1983 action,[13] the court finds that it was not denied due process of law by the Yakima County Commissioners. The purpose of the hearings conducted on August 1, 2, 8 and 9, 1983 was to hear the Tribe's appeal of The Planning Department's Declaration of Non-Significance. The hearing was statutorily mandated to provide the Tribe with the opportunity to convince the Commissioners that the Planning Department had erred and show that Brendale's proposed development warranted the preparation of an Environmental Impact Statement—which the Tribe succeeded in doing. The hearing was neither designed as a forum to contest jurisdiction nor was it an appropriate forum for such a debate. As demonstrated by the complexity of this lawsuit and the cases cited in this opinion, Indian reservation jurisdictional disputes are not easily resolved. It is unrealistic for the Yakima Nation to expect and even demand that it be given free reign at the administrative podium to argue and present evidence pertaining to the issue of jurisdiction, particularly when the Commissioner's sole function was to determine whether an EIS was warranted. The Commissioner's decision to allow the Yakima Nation to state

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[13] The parties have expended considerable effort in debating whether an Indian Tribe such as the Yakima Nation may bring a Section 1983 action. The resolution of that issue turns on whether the Tribe is "any citizen of the United States or other *person* within the jurisdiction thereof. . . ." 42 U.S.C. § 1983 (emphasis added). Neither the court nor the litigants have located any legal precedent which directly addresses that issue. It is not, however, necessary to answer that novel question since the court concludes that the Yakima Nation has not been deprived of "any rights, privileges, or immunities secured by the Constitution and laws. . . ." *Id.*

its objections to the county's jurisdiction over the Brendale property and then going forward with the appeal hearing was the proper course of action. The Tribe suffered no infringement on its rights to due process of law. *See generally Mathews v. Eldridge,* 424 U.S. 319 (1976); *Goss v. Lopez,* 419 U.S. 565 (1975); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

While the Tribe's first basis for its Section 1983 claim must fail because no due process deprivation occurred, the Tribe's second ground for relief fails because it involves a "right" which is not within the scope of Section 1983 relief. Based upon this court's conclusion that Yakima County is preempted from exerting its land use authority over the Brendale property, there can be little argument that its attempts to do so were unlawful. It can be said, therefore, that the Yakima Nation has a "right" to be free from such unlawful action. Nevertheless, not all federally created rights are "enforceable" under Section 1983. *See generally, Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1 (1981); *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981); *Maine v. Thiboutot,* 448 U.S. 1 (1980).

The Tribe's "right" to be free from the county's concurrent jurisdiction is derived from the doctrine of federal preemption. But for the operation of that doctrine, the Yakima Nation would be powerless to interfere with the county's authority. As mentioned previously, the source of preemption as applied in Indian law cases is the federal government's plenary power over Indian Tribes and the Supremacy Clause, U.S. Const. Art. VI, § 2. *See*

e.g., Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982); *Central Machinery Co. v. Arizona Tax Comm'n.,* 448 U.S. 160 (1980). Of course, "traditional notions of Indian self-government" provide an important "backdrop" which color the preemption doctrine. *McClanahan v. Arizona State Tax Comm'n.,* 411 U.S. 164, 172 (1973).

The Supreme Court has held that a Supremacy Clause violation does not give rise to Section 1983 relief. *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 615, (1979). Mere incompatibility between federal and state (local) laws "does not, in itself, give rise to a claim 'secured by the Constitution.'" *Id.* The portion of the Civil Rights Act of 1871 now codified as Section 1983 was directed at organized terrorism and the unwillingness or inability of state officials to control the widespread violence. *Id.* at 610 n.25. Thus, Section 1983 is concerned with the relationship between individuals and the state in matters involving life, liberty or property. It was not intended to apply to the distribution of allocation of power between a state and the federal or tribal government. See *id.* at 615; *Consolidated Freightways Corp. of Delaware v. Kassel,* 730 F.2d 1139 (8th Cir. 1984) (violation of Federal Commerce Clause does not secure rights within the meaning of Section 1983) *cert. denied,* 105 S.Ct. 126 (1984). In order to be entitled to relief under Section 1983, the Yakima Nation must rely on some enforceable right beyond its Supremacy Clause-derived "right" to preempt conflicting County regulations. Thus, the court concludes that the plaintiff has not stated a Section 1983 claim and

is therefore not entitled to attorney's fees under Section 1988.[14]

ATTORNEY FEES

Based upon the dismissal of the Section 1983 claims against them, defendants Glaspey and Brendale have filed petitions for attorney fees as "prevailing parties.[15] 42 U.S.C. § 1988. A prevailing defendant in a Section 1983 case may recover attorney fees "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart,* 103 S.Ct. 1933, 1937 n.2 1983; *Boatowners and Tenants Association v. Port of Seattle,* 716 F.2d 669 (9th Cir. 1983). The court finds that none of those prerequisites to fees exists in this case.

There is no contention that plaintiff's Section 1983 claims against these two defendants was vexatious or brought to embarrass them. The defendants do, however, argue that the Section 1983 claims against them were frivolous. Glaspey contends that the action was frivolous as to him because he had no ownership interest in the Brendale property. While the court does agree that the plaintiff should have extensively investigated the surrounding facts to ascertain the identity of the necessary party defendants, *see* Fed.R.Civ.P. 11, the court is unable to conclude that the inclusion of Frank Glaspey was frivolous. Defendant Brendale asserts that the suit against him was frivolous as there was no evidence that he acted "under color" of state law. Notwithstanding the court's dismissal of the Section 1983 claim on those grounds, the plaintiff's claim was not frivolous. The caselaw construing the "under color" of law language demonstrates that the application of that phrase is anything but precise. *See e.g., Howerton v. Gabica* 708 F.2d 380 (9th Cir. 1983); *Fonda v. Gray,* 707 F.2d 435 (9th Cir. 1983); *Soo v. Rosenberg,* 702 F.2d 1263 (9th Cir. 1983); *Arnold v. International Business Machines,* 637 F.2d 1350 (9th Cir. 1981). The courts' difficulty in establishing definitional parameters has resulted in almost a case-by-case analysis. For this reason, it was not unreasonable or frivolous for the plaintiff to assert that Brendale was acting "under color" of law when he sought Yakima County approval of his proposed development.

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[14] 42 U.S.C. § 1988 provides:

In any action or proceeding to enforce a provision of sections 1981, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[15] During the trial the court dismissed all of plaintiff's claims against Glaspey. At the conclusion of the trial the court dismissed plaintiff's Section 1983 claim against Brendale, finding that Brendale had not acted "under color" of state law. 42 U.S.C. § 1983.

CONCLUSION

Based upon the above Findings of Fact and legal conclusions, judgment shall be entered in favor of the plaintiff as against all defendants (except Frank Glaspey) to the following intent: The court declares that the Yakima Indian Nation has exclusive regulatory jurisdiction over the land use of the Brendale property described on page 12 of this memorandum opinion.

As to plaintiff's 42 U.S.C. § 1983 claims, judgment shall be entered in favor of defendants Jim Whiteside, Graham Tollefson, Charles Klarich, Richard Anderwald, Philip Brendale and Frank Glaspey.

Plaintiff's 42 U.S.C. § 1983 claims are DISMISSED WITH PREJUDICE.

All parties shall bear their own attorney fees.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 10th day of September, 1985.

/s/ _____
JUSTIN L. QUACKENBUSH
United States District Judge

APPENDIX D

TREATY WITH THE YAKIMAS, 1855

12 Stat. 951, June 9, 1855—Treaty

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, WallaWalla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the Territory of Washington, on the part of the United States, and the undersigned Head Chief, Chiefs, Headmen and Delegates of the Yakama, Palouse, Pisquose, Wentachapam, Klikatat, Klinquit, Kow-was-say-ee, Ki-ay-was, Skin-pah, Wishham, Shyiks, Oche-choetes, Kah-milt-pah, and Se-ap-cat, Confederatel Tribes and Bands of Indians occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamiakun as its Head Chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

CESSION OF LANDS

ARTICLE 1. The aforesaid Confederated Tribes and Bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

BOUNDARIES

Commencing at Mount Rainier, thence northerly along the main ridge of the Cascade Mountains to the point

where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasternly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes (119°10′) which tow latter lines separate the above Confederated Tribes and Bands from the Oakinakane Tribe of Indians; then in a true south course to (952) forty-seventh (47°) parallel of latitude; thence east on said parallel to the Mail Palouse River, which two latter lines of boundary separate the above Confederated Tribes and Bands from the Spokanes; thence down the Palouse to its junction with the Mohhah-ne-she, or southern tributary of the same; thence, in a south-easterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above Confederated Tribes from the Nez Perce Tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "Big Island," between the mouths of the Umatilla River and Butler Creek; all of which latter boundaries separate the above Confederated Tribes and Bands from the Walla-Walla, Cayuse, and Umatilla Tribes and Bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

RESERVATION

ARTICLE 2. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid Confederated Tribes and Bands of Indians, the tract of land included within the following boundaries to wit:

BOUNDARIES

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attahnam River to the Forks, thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All of which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said Confederated Tribes and Bands of Indians, as an Indian Reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said Confederated Tribes and Bands agree to remove to, and settle upon the same within one year after ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United

States; and upon any ground claimed or occupied, if with the permission of the owner of claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, that any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value shall be furnished him as aforesaid.

ARTICLE 3. And provided that, if necessary for the public convenience, (953) roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways.

PRIVILEGES SECURED TO INDIANS

The exclusive right of taking fish in all the streams, where running through or bordering said reservations, is further secured to said Confederated Tribes and Bands of Indians, as also the right of taking fish at all usual and

accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

PAYMENT BY THE UNITED STATES

ARTICLE 4, In consideration of the above cession, the United States agree to pay to the said Confederated Tribes and Bands of Indians in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: sixty thousand, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: for the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars per year; and for the next five years, four thousand dollars per year.

All which sums of money shall be applied to the use and benefits of said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

UNITED STATES TO ESTABLISH SCHOOLS

ARTICLE 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said Confederated Tribes and Bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and ploughmaker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and ploughmaker, for the instruction of the Indians in trades and to assist in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provide with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said Confederated Tribes and Bands of Indians is expected,

and will be called upon, to perform many services of a public character, occupying much of his time, the United States further agrees to pay to the said Confederated Tribes and Bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as salary for such person as the said (954) Confederated Tribes and Bands of Indians may select to be their Head Chief; to build for him at a suitable point on the reservation a comfortable house and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such Head Chief so long as he may continue to hold that office.

KAMAIAKUN IS THE HEAD CHIEF

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized Head Chief of the Confederated Tribes and Bands aforesaid, styled the Yakama Nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said Confederated Tribes and Bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be charged upon the annuities, but shall be defrayed by the United States.

RESERVATION MAY BE SURVEYED

ARTICLE 6. The President may, from time to time, at This discretion, cause the whole or such portions of

such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said Confederated Tribes and Bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the Treaty with the Omahas, so far as the same may be applicable.

ANNUITIES NOT TO PAY DEBTS OF INDIVIDUALS

ARTICLE 7. The annuities of the aforesaid Confederated Tribes and Bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid Confederated Tribes and Bands of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed compensation may be made by the government out of the annuities.

NOT TO MAKE WAR BUT IN SELF DEFENSE

Nor will they make war upon any other tribe, except in self-defense, but will submit all matters of differences between them and other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on

any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said Confederated Tribes and Bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The said Confederated Tribes and Bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said Confederated Tribes and Bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

WENATSHAPAM FISHERY RESERVED

ARTICLE 10. And provided, that there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid Confederated Tribes and Bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquose or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian Reservations.

WHEN TREATY TO TAKE EFFECT

ARTICLE 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

(955) In testimony whereof, the said Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the Territory of Washington, and the undersigned Head Chief, Chiefs, Headmen, and delegates to the aforesaid Confederated Tribes and Bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Isaac I. Stevens
Governor and Superintendent
Kamaiakun
His X mark
Skloom
His X mark
Owhi
His X mark
Te-cole-kun
His X mark
La-hoom
His X mark
Me-ni-nock
His X mark
Elit Palmer
His X mark
Wish-oh-kmpits
His X mark
Koo-lat-toos
His X mark
Shee-ah-cotte
His X mark

Tuck-quille
His X mark
Ka-loo-as
His X mark
Scha-noo-a
His X mark
Sla-kish
His X mark

Signed and sealed in presence of:

James Doty
Secretary of Treaties
Mie. Cles (Jean Charles)
Pandosy
O.M.I.
Wm. C. McKay
W. H. Tappan
Sub Indian Agent, W.T.
C. Chirouse
O.M.I.
Patrick McKenzie
Intrepreter
A. D. Pamburn (Pambrun)
Intrepreter
Joel Palmer
Supt. of Indian Affairs, O.T.
W. D. Biglow
A. D. Pamburn (Pambrun)
Intrepreter

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the said Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise

and consent to the ratification of the same by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION"
SENATE OF
THE UNITED STATES
March 8, 1859

"Resolved, (two thirds of the senators present concurring), that the Senate advise and consent to the ratification of treaty between the United States and the Head Chief, Chiefs, Headmen, and delegates of the Yakima, Palouse, and other Confederated Tribes and Bands of Indians, occupying lands laying in Washington Territory, who, for the purpose of this treaty, are to be considered as one nation, under the name of "Yakima," with Kamaiakun as its Head Chief, signed 9th June, 1855.

Attest:

"Asbury Dickens, Secretary."

Now, therefore, be it known that I, James Buchanan, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March eighth, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

(956) In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the City of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hun-

dred and fifty-nine, and of the independence of the United States the eighty-third.

James Buchanan

By the President:

Lewis Cass, Secretary of State

[redacted]

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

[redacted] *Petitioner,*

v.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION, et al., *Respondents.*

[redacted] *Petitioner,*

v.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION, *Respondent.*

CONFED. TRIBES OF YAKIMA et al., *Petitioners,*

v.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION, *Respondent.*

BRIEF OF THE STATES OF ARIZONA, NEVADA, NEW MEXICO, SOUTH DAKOTA, UTAH, WASHINGTON, AND WYOMING IN SUPPORT OF PETITIONERS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does an Indian Tribe have the authority to control, through comprehensive zoning, the use of land owned by non-members but located within a reservation's boundaries, under either of the following circumstances:

(a) The land has been alienated to a non-Indian, pursuant to the federal Allotment Acts; or

(b) The land, originally allotted to a tribal member, has been received through inheritance by an heir of such member, but the heir, by reason of insufficient blood quantum, is not a tribal member?

2. Is it constitutionally permissible, under the Due Process Clause of the Fifth Amendment to the United States Constitution, for the United States acting through either the Congress, the Executive Branch, or the courts, to adopt a policy pursuant to which:

(a) Indian tribal governments have general civil regulatory jurisdiction over non-member reservation residents and their on-reservation property; and

(b) Such residents have none of the rights of participation in tribal government, as either voters in tribal elections or as candidates for tribal offices, enjoyed by tribal members, and, by reason of their ancestry, are disqualified from ever attaining such rights through tribal membership?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTEREST OF THE STATES AS AMICI CURIAE	1
STATEMENT OF THE CASE	4
A. Proceedings Below	4
B. The Tribal Zoning Ordinance	5
C. The Rationale Of The District Court	5
D. The Rationale Of The Court Of Appeals	7
REASONS FOR GRANTING THE WRITS	8
THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW AFFECTING INDIANS AND NON-INDIANS NATIONWIDE WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	8
A. This Case Presents Questions Regarding The Scope Of Indian Tribal Sovereignty Which Are As Important As Those Decided In *Montana v. United States*, For The Same Reasons As In *Montana*	8
B. The Court Of Appeals Has Completely Disregarded The Intent Of Congress, As Embodied In The Allotment Acts And As Applied By This Court In *Montana*	10
C. The Indian Reorganization Act Of 1934 Did Not Repudiate The Policy Embodied In The Allotment Acts That Tribes Would Have No Civil Jurisdiction Over Non-Indians	12
D. The Understanding Of The Executive Branch Has Been That Indian Tribes Possess No Inherent General Governmental Power Over Non-Members	15
E. Constitutional Considerations	17
CONCLUSION	20
APPENDIX A A State-By-State List Of All Reservations	A-1
APPENDIX B Letter Dated January 26, 1988, From John R. Bolton, Assistant Attorney General, U.S. Department of Justice, to Senator Daniel K. Inouye	B-1

TABLE OF AUTHORITIES

Page

Federal Cases:

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 18

DeCoteau v. District Court, 420 U.S. 425, at 431 (1975) . 1

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 12, 19

Marsh v. Alabama, 326 U.S. 501 (1946) 18

McClanahan v. Arizona Tax Commission, 411 U.S. 164, at 172 (1973) 17

Montana v. United States, 450 U.S. 544 (1981) .....passim

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985) 3, 10, 18

National League of Cities v. Usery, 426 U.S. 833 (1976) 12

Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978) 2, 3, 8, 9, 10, 12, 17

Shelley v. Kraemer, 334 U.S. 1 (1948) 18

Shoshone Bannack Tribe v. FMC Corp., 14 Ind. Law Reptr. 6046 (1987) 9

Talton v. Mayes, 163 U.S. 376 (1896).....17, 18, 19

United States v. Wheeler, 435 U.S. 313 (1978) 17

Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, at 141 (1981) 12

Williams v. Lee, 358 U.S. 217 (1959)..... 11

Statutes:

25 U.S.C. § § 1301 et. seq. (Indian Civil Rights Act).... 19

Indian Reorganization Act of 1934, 48 Stat. 984 .....12, 15

General Allotment Act of 1887, 24 Stat. 388..... 10

Miscellaneous:

General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Table 71, "General Characteristics for American Indian Persons on Reservations and Alaska Native Villages." 2, 8

Page

Hearings Before the Committee on Indian Affairs, United States Senate on S. 2755, 73rd Cong. 2nd Sess. (1934) 14, 15

H.R. 7902, 73rd Cong. 2nd Sess. (1934) 13

"Powers of Indian Tribes," (M-27781— 55 I.D. 14 (1934)...19

Resolution T-98-72, Amended Zoning Regulations of the Yakima Indian Nation 5

"Wheeler-Howard Act—Interpretation," Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I, 484 (M-27810, Dec. 13, 1934)...15-17

2 Op. Atty. Gen. 693 (1834)..... 18

Nos. 87-1622, 87-1697, and 87-1711

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

PHILIP BRENDALE, *Petitioner,*

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, et al., *Respondents.*

STANLEY WILKINSON, *Petitioner,*

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *Respondent.*

COUNTY OF YAKIMA et al., *Petitioners,*

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *Respondent.*

BRIEF OF THE STATES OF ARIZONA, NEVADA, NEW MEXICO, SOUTH DAKOTA, UTAH, WASHINGTON, AND WYOMING IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF THE STATES AS AMICI CURIAE

Each of the States submitting this brief has within it one or more Indian reservations. On many of those reservations the "familiar forces" set in motion by the Federal Government in the late 1800's and alluded to by this Court in *DeCoteau v. District Court*, 420 U.S. 425, at 431 (1975), have

produced the expected results. Pursuant to the invitation of the Federal Government, non-Indians have purchased land within those reservations, have established their homes and businesses there, and in many cases now actually outnumber the Indian population.[1] We estimate the total non-Indian reservation population, nationwide, to be about 350,000.[2] The Yakima Reservation, involved in this case, provides a typical example of the effects of the "familiar forces"; the non-Indian population, about 20,000, is over four times the Indian population.

The Yakima Reservation also provides a typical example of the types of claims being made by the Tribes for whom those reservations were originally set aside. The Yakima Tribe here claims that its inherent tribal sovereignty includes within it not only the power of self-government, *i.e.*, governmental power over its own members, but also a much broader power, *i.e.*, governmental power over non-members and their property. The Tribe further claims that the exercise of such power over non-members and their property preempts the exercise of any similar power by State and local governments.

In this case, the court below upheld the tribal claim of regulatory power over non-members and their property, and vacated the district court's ruling which had rejected the tribal claim of preemption.

The interest of the amici States in this case is thus twofold. First, there is the same interest which prompted the participation of the Washington Attorney General as amicus curiae in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978),

[1]A state-by-state list of all reservations is attached as Appendix A. This list also contains the total population and the Indian population for each reservation. It is compiled from General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Table 71, "General Characteristics for American Indian Persons on Reservations and Alaska Native Villages," pp. 1-300 through 1-303. (We have excluded data for the Alaska Native Villages, which do not have the legal status of reservations.) The classification in this table, it should be noted, allows only an approximation of tribal and non-tribal members, since some Indians may not be members of the tribe on whose reservation they reside. Also, some non-members may be residing on Indian land as lessees, rather than on their own land.

[2]See Appendix A for the data from which this estimate is made.

and which similarly prompted the Montana Attorney General to resist the jurisdictional claims of the Crow Tribe in *Montana v. United States*, 450 U.S. 544 (1981). Simply put, that interest is in protecting a large group of the State's citizens from the power of a tribal government in which they cannot participate in any manner and the actions of which, however arbitrary, are not subject to any effective judicial checks. After *Oliphant*, to be sure, protection exists for such citizens in the criminal area. But at least within the Ninth Circuit, little, if any, protection exists in the civil area. These citizens can avoid the uncontrolled power of tribal governments only by giving up their present homes and businesses and moving off the reservation.

Second, if the decision below is not reversed, we fully expect even more claims of preemption by tribal governments of state and local governmental powers over non-members, not just in the area of zoning, but in broader areas such as environmental controls, taxation, and general business regulation.[3]

Non-members living and doing business within our nation's Indian reservations thus face a disturbing prospect. Tribal governments in which these non-members have no voice and over which there are no effective political or legal checks may be increasing the scope of their powers, and may thus be gradually replacing, as a practical matter, those governmental bodies in which the non-members do have a voice and over which there are effective checks.

Further, as this shift in governmental power takes place, from the States and their local governments to the 268 Indian Tribes within this country, there will inevitably be a type of balkanization of government within each State, and a consequent breakdown of the power of each State over its own non-Indian citizens.

We cannot countenance such a development. Nor should this Court.

[3]A third interest should not be overlooked. State and local governments are themselves property owners within reservations, using that property to provide educational and other governmental services for the Indian and non-Indian reservation residents. *See, e.g., National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845 (1985).

STATEMENT OF THE CASE

Because this brief is submitted in support of three separate petitions for a writ of certiorari, all of which involve the same underlying proceedings, a brief history of those proceedings may be useful in showing the relationship between the various petitions. We shall also add a word regarding the tribal zoning ordinance which is here in controversy, and the rationales used by the district court and the court of appeals in reaching their decisions.

A. Proceedings Below.

The Confederated Tribes and Bands of the Yakima Indian Nation (hereafter "Yakima Tribe") brought two separate actions in federal district court, the first involving what is commonly called the "closed area" of the Yakima Reservation, and the second involving what is commonly called the "open area." Following the usage of the courts below, we shall refer to the first action as *Whiteside* I, and the second action as *Whiteside* II.[4]

In both district court actions, Yakima County and its commissioners were joined as defendants. The Tribe, as plaintiff, joined as well various non-member landowners who were contemplating development of their land. Petitioner Philip Brendale, who owned land in the closed area, was thus joined as a defendant in *Whiteside* I, and Petitioner Stanley Wilkinson, who owned land in the open area, was joined as a defendant in *Whiteside* II.

In *Whiteside* I, the district court held that the Tribe had zoning authority over all land within the closed area, including land owned by non-members such as Mr. Brendale, and that this tribal authority was exclusive of any authority in the county. In *Whiteside* II, in contrast, the district court held that the Tribe had no such authority over land within the open area that was owned by non-members, such as Mr. Wilkinson, and that exclusive zoning authority over such land rested with the county.

[4](Jim Whiteside, a county commissioner, was the first of the individually named defendants in each action.)

Mr. Brendale, though not the county, appealed the ruling in *Whiteside* I. The Tribe appealed the ruling in *Whiteside* II. The court of appeals affirmed the district court's ruling in *Whiteside* I, but reversed the ruling in *Whiteside* II, for reasons which we shall examine shortly. Thus, through Mr. Brendale's petition, review is sought of the court of appeals' ruling in *Whiteside* I; and through the petitions of Mr. Wilkinson and the County, review is sought of the ruling in *Whiteside* II. By this brief, we urge review of both rulings.

B. The Tribal Zoning Ordinance.

As pointed out by the court of appeals, only the following uses are permitted in the closed area:

1. Harvesting wild crops;
2. Grazing, timber production or open field crops;
3. Hunting or fishing by Tribal members;
4. Camping in temporary structures;
5. Tribal camps for the education and recreation of tribal members;
6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in furtherance of tribal resources;
7. No building or other permanent structure or any appurtenances thereto other than those allowed in Sections 1-6 above shall be allowed in this district; Yakima County Pet. 4-A--5-A. (Quoting from Resolution T-98-72, Amended Zoning Regulations of the Yakima Indian Nation, hereafter "Tribal Ordinance", Sec. 23.)

Petitioner Brendale's use of his 160 acres in the closed area is thus severely restricted.

C. The Rationale Of The District Court

In *Whiteside* II, the district court, as we have noted, found the tribal ordinance to be invalid as applied to the open area, and as applied specifically to the property of Mr. Wilkinson. Focusing upon the criteria for a valid exercise of tribal civil jurisdiction over non-Indians on their own lands,

as established in *Montana v. United States*, 450 U.S. 544 (1981), the court entered *inter alia*, the following findings of fact:

* * *

10. The trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Yakima Nation. The proposed Wilkinson development does not threaten a food source of members of the Yakima Nation.

11. Similarly, the Wilkinson project does not threaten the economic security of the Yakima Nation. The plaintiff has not demonstrated how Yakima County's regulation of the land use of Wilkinson's "Open Area" property in any way places its economic security in jeopardy.

12. In contrast to the "Closed Area", the "Open Area" is not of a unique religious or spiritual significance to the members of the Yakima Nation. The county's regulation of the Wilkinson property will not significantly infringe on those cultural values.

13. While the court is aware of the special role which land and other natural resources play in the culture of the Yakima Indian Nation, the court finds that the county's exercise of its land use regulatory jurisdiction over the subject property does not threaten those aspects of the tribal culture.

14. The Yakima Nation's political integrity will not be diminished. The County's regulation of Wilkinson's fee land will not hinder the Yakima Nation from exercising its regulatory jurisdiction over the trust land.

15. In sum, the court finds that Yakima County's exercise of its regulatory jurisdiction over the at-issue Wilkinson property does not threaten and will not have a direct effect on the Yakima Nation's political integrity, its economic security or its health or welfare. Yakima County Pet. 30-A--31-A.

In his oral opinion the district court judge made it unmistakably clear that he thought more was at stake than just a question of jurisdiction. He stated:

> In utilizing the *Montana* standards, I am not unmoved by the desire of the Tribe and the Members thereof to have its treaty lands returned to it, but that does not, in my opinion, justify my finding that such a desire constitutes a threat to the political integrity, the economic security, or the health or welfare of the Tribe and its Members. Yakima County Pet. 50-A.

Again:

> I am unable to find that the desire, the sincere desire of the Tribe and its Members to have the deeded land restored to it is such as interferes with the political integrity, the economic security, or the health or welfare of the Tribe and its Members. Once again, that is a matter for the Legislative Branch, not the Judicial Branch to determine. Yakima County Pet. 51-A.

And again:

> I suggest to the Yakima Indian Nation that despite your sincere belief that all of the land within the exterior boundaries should be returned in accordance with the Treaty of 1855, that that may be some time in coming. I think you recognize that that is a matter for the Legislative Branch of this Government to decide; to-wit, Congress. Yakima County Pet. 52-A.

In that same oral opinion, the judge also explained why his ruling in *Whiteside* I was just the opposite from that in *Whiteside* II. He stated:

> While this case [*Whiteside* II] also involves land within the exterior boundaries of the Yakima Indian Reservation, the factual circumstances in the two cases are strikingly different. They are as different, in my opinion, as night and day. Yakima County Pet. 44-A.

The judge then went on to point out the different population and land ownership patterns in the open and closed areas, and the different degrees and types of interests of the county in each. See Yakima County Pet. 44-A--47-A.

D. **The Rationale Of The Court Of Appeals.**

In reversing the district court's ruling in *Whiteside* II, the court of appeals ignored entirely the findings of the district court, quoted above, which had applied the *Montana* criteria and which had found, under those criteria, no factual justification for the Tribe's claim of zoning jurisdiction over non-Indians. Instead, the court of appeals first determined that Indian tribal sovereignty includes zoning power, at least

over tribal members. *See* Yakima County Pet. 10-A. It then determined that extension of this power to non-members and their lands was necessary in order to fully effectuate zoning power over tribal members. In the words of the court:

> If we were to deny the Yakima Nation the right zone to fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme. This we are unwilling to do. Yakima Pet. 13-A.

With this ruling, a major underpinnning for upholding the County zoning ordinance as applied to the open area was eliminated. The court of appeals did not, however, invalidate the County ordinance then and there, but remanded the question of its validity to the district court, for further weighing of federal, tribal, and county interests in the open area.

This ruling in *Whiteside* II also, of course, made affirmance in *Whiteside* I a foregone conclusion.

REASONS FOR GRANTING THE WRITS

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW AFFECTING INDIANS AND NON-INDIANS NATIONWIDE WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. This Case Presents Questions Regarding The Scope Of Indian Tribal Sovereignty Which Are As Important As Those Decided In Montana V. United States, For The Same Reasons As In Montana.

We begin with *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), in which the Court held that Indian Tribes have no inherent criminal authority over non-Indians. The importance of that decision, and the scope of its effect, is shown by Appendix A, which is a listing, state-by-state, of all the Indian Reservations identified in the 1980 Census. According to that census data, there are 268 reservations, located in 33 States. The total population on those reservations is about 682,000, of which, as we have already noted, slightly more than half, about 350,000, are non-Indian. These non-Indians,

together with an undeterminable number of non-Indians who might be temporarily within a reservation for one reason or another, are now protected by the *Oliphant* decision.

But does the rationale of *Oliphant* extend to the civil side, so that its protection applies to tribal assertions of civil jurisdiction as well? In *Montana v. United States*, 450 U.S. 544 (1981), the Court answered that question in the affirmative, and on that basis invalidated an effort by the Crow Tribe to regulate non-Indian hunting and fishing on non-Indian lands.

The Court stated:

> Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. *Montana*, 450 U.S. at 564-565.

Again, the data presented in Appendix A show the potential scope and consequent importance of *Montana*.

Not only is the same general group of citizens adversely affected by the decision below, but the risk to which they are now exposed is, if anything, even more serious than that involved in *Montana*. While a Tribe may not, under *Montana*, prohibit or otherwise regulate the use of land such as Mr. Wilkinson's and Mr. Brendale's for hunting or fishing, it may, under the decision below, regulate and even prohibit the use of that same land for just about anything else. Further, under the rationale of the court of appeals, tribal authority over non-Indians on non-Indian lands would not be confined just to zoning. It could include business regulation, taxation, environmental controls, or any other area of governmental power, just so long as a Tribe can make a plausible argument that the exercise of such power would promote the tribal welfare. See, *e.g.*, *Shoshone Bannack Tribe v. FMC Corp.*, 14 Ind. Law Reptr. 6046 (1987) (Tribal ordinance controls non-Indian company's hiring policies, despite conflict between ordinance and collective bargaining agreement.)

For these reasons, the questions presented for review here are no less important than those decided in *Montana*.

B. **The Court Of Appeals Has Completely Disregarded The Intent of Congress, As Embodied In The Allotment Acts And As Applied By this Court In Montana.**

In denying to the Crow Tribe the authority to regulate hunting and fishing by non-Indians on non-Indian lands, the Court in *Montana* relied not only upon the *Oliphant* rationale, but also upon the policies of Congress, as embodied in the Allotment Acts of the late 1800s, pursuant to which the non-Indians had obtained those lands in the first place. See, *e.g.*, the General Allotment Act of 1887, 24 Stat. 388. As stated by the Court:

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with dissolution of tribal affairs and jurisdiction. [citations omitted] It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. * * * *Montana*, 450 U.S. at 559, note 9.

What this Court viewed as "common sense" in *Montana* proved to be no obstacle to the court of appeals in reaching the result it desired in this case. Even more importantly, focusing upon the intent of Congress as embodied in the allotment acts puts in sharp relief what is really at stake here. As explicitly recognized by the district court, the Yakima Tribe is attempting to reverse and undo the effect of the allotment policy, and thus remove from non-Indians precisely the protection Congress intended they should have. (See pp. 6-7, supra.)

There are, to be sure, qualifications to the general rule established in *Montana*, that Tribes have no civil jurisdiction over non-Indians on non-Indian land. The "bright line" which exists on the criminal side after *Oliphant* does not yet exist on the civil side, even after *Montana*. *See* also *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

As stated in *Montana*:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee*, *supra*, at 223; *Morris v. Hitchcock*, 194 U.S. 384; *Buster v. Wright*, 135 F 947, 950 (CA8); see *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154. *Montana*, 450 U.S. at 565-566.

The Court then stated a second qualification:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *See Fisher v. District Court*, 424 U.S. 382, 386; *Williams v. Lee*, *supra*, at 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129; *Thomas v. Gay*, 169 U.S. 264, 273. *Montana*, 450 U.S. at 565-566.

But the court of appeals has in effect so expanded these qualifications as to turn them into the rule itself, in complete disregard of the congressional policy applied in *Montana*. The court of appeals uses them as a license to ignore and nullify that policy completely, and treats them, in effect, as a repudiation of everything the Court had just stated up to that point as the grounds for its decisions, *i.e.*, its discussion of the allotment policy and the principles of *Oliphant*.

Those qualifications, we submit, were intended to have a much narrower scope and more modest role. As in *Williams v. Lee*, 358 U.S. 217 (1959), for example, which was twice cited by the Court, the right of tribal self-government guaranteed by a treaty or executive order is a shield which bars a non-Indian from subjecting a tribal member involuntarily to a non-Indian court with respect to a commercial dispute. But even under *Williams* that right is not a sword which the

tribal member may use to subject the non-Indian to some form of tribal jurisdiction involuntarily. Those qualifications—especially the second—may also reflect a doctrine of tribal self-government analogous to that developed, but subsequently abandoned, for States in *National League of Cities v. Usery*, 426 U.S. 833 (1976). *Cf. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

The danger in going beyond these narrow limits in applying the *Montana* qualifications is not simply that the policy embodied in the allotment acts would be jettisoned. As suggested by the remarks of the district court judge quoted above (see p. 7 supra), an even more fundamental question involves the proper role of the courts in a case such as this. Are the courts, taking as their charter an overly broad reading of the *Montana* qualifications, to fashion some sort of federal common law, based on their own notions of what national Indian policy should be? Or are they to ascertain, as the Court did in *Oliphant* and *Montana*, what the Congress intended, through a careful analysis of the relevant treaty and statutory provisions?

The power conferred upon the Yakima Tribe by the decision below is "* * * a creature of judicial cloth, not legislative cloth* * *" *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, at 141 (1981). Review of that decision will allow the Court to reorient the lower courts—and the court below especially—in the proper direction.

C. The Indian Reorganization Act of 1934 Did Not Repudiate The Policy Embodied In The Allotment Acts That Tribes Would Have No Civil Jurisdiction Over Non-Indians.

The assimilationist policies embodied in the allotment acts were, to be sure, repudiated by the Indian Reorganization Act of 1934, 48 Stat. 984. Among the policies so repudiated was the policy of eliminating Indian reservations and tribal governments. But that Act did not repudiate the policy that Tribes would have no civil jurisdiction over non-Indians. Viewed in the light of its legislative history, the Act actually confirmed that policy.

The Indian Reorganization Act, as originally introduced in Congress, was a very different bill from that which eventually passed. Those differences are of great significance here. The original version was introduced in the House as H.R. 7902, 73rd Cong., 2nd Sess. (1934) and in the Senate as S. 2755, 73rd Cong., 2nd Sess. (1934).

The heart of the bill was Title I, "Indian Self-Government." Section 2 of Title I read, in pertinent part, as follows:

> In accordance with the foregoing purposes, the Secretary of the Interior is hereby authorized to *issue* to the Indians residing upon any Indian reservation or reservations or subdivision thereof a *charter granting to the said community group any and all such powers of government * * * as may seem fitting in the light of the experience, capacities, and desires of the Indians concerned* * * * (Emphasis supplied.)

Section 4 spelled out in more detail the powers which were to be included in the charter. The first is found in subsection (a):

> (a) To organize and act as a *Federal municipal corporation*, to establish a form of government to adopt and thereafter to amend a constitution, and to promulgate, and enforce ordinances and regulations for the effectuation of the functions hereafter specified, *and any other functions customarily exercised by local governments.* (Emphasis supplied.)

Subsection (d) granted another important power:

> (d) To establish courts *for the enforcement and administration of ordinances of the community*, which courts shall have *exclusive jurisdiction over all offenses of, and controversies between, members of the chartered community, under the ordinances of such community, and jurisdiction exclusive or non-exclusive over all other cases arising under the ordinances of the community*, and shall have power to render and enforce judgments, criminal and civil, legal and equitable, and to punish violations of local ordinances by fine not exceeding $500, or in the alternative, by imprisonment for a period of not exceeding six months: * * * * (Emphasis supplied.)

Title IV of the bill also dealt with courts, establishing a

Court of Indian Affairs. Section 3 of this Title spelled out the broad jurisdiction of that court, which included jurisdiction "of all cases, civil or criminal, arising under the laws and ordinances of a chartered Indian community, wherein a real party in interest is not a member of such community." (Subsection 4)

Clearly, a chartered Indian community was to have broad legislative jurisdiction over non-members—as broad as those of any municipal corporation or other unit of local government. And the tribal courts and the Court of Indian Affairs would have jurisdiction over non-members as well.

Titles I and IV did not survive. The major reason was that the chairman of the Senate on Indian Affairs, Senator Wheeler, was adamantly opposed.[5]

How Senator Wheeler's objections were met is best explained in his own words:

> The Chairman. * * * I got together with the Commissioner of Indian Affairs and went over the important

[5]In the hearings on S. 2755, the following exchange took place concerning Title I, with its proposal for federally chartered Indian communities which would exercise governmental powers over non-Indians.

> The Chairman. Well, you might possibly, Mr. Commissioner, get, for instance, some tribe of Indians in Montana [the Chairman's home state] who would want to try this, and they might get a sufficient number of signers to a petition to have a charter issued.
>
> Commissioner [of Indian Affairs] Collier. Yes.
>
> The Chairman. But if they did do it, in my judgment, it would bring about all kinds of conflicts between your Indians and the white people, and, in addition to that, it would set back the Indians, in my judgment, considerably by doing it, and I am afraid that it would lead to conflicts in the Northwest between the Indians and the whites.
>
> I mean, supposing that Indian Bureau went out there, for instance, if you had this provision in there, your Indian Bureau could go out there and take those Indians possibly and propagandize them and get sufficient numbers of them to sign it and issue a charter, and then attempt to set up this government within a government out there, which would be, in my judgment, a serious mistake on the part of the Indians to do it. Hearing Before the Committee on Indian Affairs, United States Senate on S. 2755, 73rd Congress, 2nd Sess. (1934) p. 68 (hereinafter "1934 Hearings").

Senator Wheeler liked the proposed court system in Article IV, with its jurisdiction over non-Indians, no better. *See* 1934 Hearings, pp. 205-208.

> points that I thought were in controversy, and yesterday they sent up this bill, which eliminates, it seems to me, practically all of the matters that are in controversy, * * * 1934 Hearings, p. 237.

The bill which the BIA sent up was the bill which ultimately passed. (Compare S. 3645, reproduced at 1934 Hearings, p. 234, and Act of June 18, 1934, 48 Stat. 984). All of the provisions for any sort of Indian jurisdiction over non-Indians had been eliminated. Thus the Congress, in 1934, denied to the Indians the broad, general governmental powers over non-Indians which the BIA had hoped to attain for the Indians. And that fact is reason enough for this Court to deny the claim to any such powers now.

D. The Understanding Of The Executive Branch Has Been That Indian Tribes Possess No Inherent General Governmental Power Over Non-Members.

In 1934, shortly after passage of the Indian Reorganization Act, the Solicitor of the Department of Interior, Mr. Margold, was squarely faced with the question of the extent of an Indian Tribe's inherent sovereign power over non-members. The specific question was the extent of a Tribe's inherent power of eminent domain. Op. Sol. I.D. Ind. Aff. 1917-1974, Vol I, 484, 489-491 (Dec. 13, 1934).[6]

The opinion first considered the source of this tribal power.

> The power of eminent domain is one of the usual powers of sovereignty. It is, as the United States Supreme Court held in *Cincinnati v. Louisville and Nash, R.R. Co.* (223 U.S. 390, 404) "one of the powers vital to the public welfare of every self-governing community."
>
> No Federal statutes terminating the exercise of this power by an Indian tribe are known. Therefore, under the doctrines advanced in the recent opinion of this Department on "Powers of Indian Tribes" (M-27781, approved October 25, 1934), the power of eminent domain is one of those powers which are vested in an Indian

[6]This important opinion remained unpublished until this two volume compilation.

tribe within the meaning of Section 16 of the Wheeler-Howard [Indian Reorganization] Act. At 489.

Yet Solicitor Margold concluded:

I am of the opinion that the Indian Service is correct "in assuming that a tribe organized under section 16 may exercise the power of eminent domain in the acquisition of land as against its members, but not in the case of land owned in fee by non-members." *Ibid.*

This inherent power of eminent domain, which is "one of the usual powers of sovereignty," may be exercised only with respect to tribal members.

From this, Solicitor Margold draws another important conclusion:

It is proper to add that since the tribal power of condemnation is based, in the first instance, upon tribal jurisdiction over the members of the tribe, it ceases to exist where an Indian abandons his tribal membership; and as was said in the opinion of this Department on "Powers of Indian Tribes," (M-27781, approved October 25, 1934, at page 36), "any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses." * * *

Threatened oppression in the form of condemnation, taxation, or other incidents of social control may be avoided by the termination of the landowner's tribal status. But if he remains to share in the benefits of tribal life he must bear its burdens.

The restricted land of the Indian who has severed his tribal affiliation is not subject to tribal condemnation proceedings under tribal law. At 490.

Non-Indians are in the same status as the Indian who has severed his tribal membership, as the opinion goes on to make clear.

Accordingly, patented land may be condemned, as it may be taxed on exactly the same basis as the land of non-Indians. An Indian tribe will have whatever rights of condemnation the laws of the State may give to it. * * *

Land held in fee, therefore, whether owned by Indians or by non—indians, may be condemned by an Indian tribe only in accordance with State law, through proceedings brought in State courts. At 490, 491.

As this opinion explicitly recognizes, a tribal claim of general governmental power, even if it be on the civil side, and whether it involves condemnation, taxation, or any other form of civil jurisdiction, is valid only with respect to tribal members.[7] And as the opinion reminds us, our system of government has no room for "threatened oppression in the form of condemnation, taxation, or other incidents of social control" over those non-members.

E. Constitutional Considerations.

The reference to "threatened oppression" in Solicitor Margold's opinion serves as a reminder that important constitutional issues are here involved. We are not suggesting that they need final resolution here; but they certainly form a "backdrop" which is no less important in construing relevant treaties and statutes, than the backdrop of tribal sovereignty. *Cf. McClanahan v. Arizona Tax Commission*, 411 U.S. 164, at 172 (1973).

Tribal governments are not subject to the Bill of Rights, which governs the conduct of the Federal Government, or to the Fourteenth Amendment, which governs that of the States and its political subdivisions. *Talton v. Mayes*, 163 U.S. 376 (1896). This is because Indian Tribes, unlike political subdivisions of a State, do not exercise power delegated by a superior sovereign. *United States v. Wheeler*, 435 U.S. 313 (1978).

But if, as we submit, the ultimate controlling factor in this case is congressional intent, the Bill of Rights surely controls the permissible scope of that intent. And this gives rise to an obvious problem. How can it be permissible for Congress to intend—and thereby bring about—a system of government which itself would surely be constitutionally im-

[7]We are not in any way suggesting that position of the executive has been consistent with Solicitor Margold's over the years. Indeed, to take just two examples, the United States sided with the Indians' position in *Oliphant* and *Montana*. Rather, the point is that Solicitor Margold's opinion shows the position of the executive shortly after the adoption of the Indian Reorganization Act and its understanding of the limited effect of that Act—an understanding reinforced by the legislative history discussed above.

permissible to the extent that non-members who are subject to it cannot possibly participate in it, through the voting franchise or otherwise?

Talton v. Mayes, supra, shields tribal governments from the Bill of Rights; but it does not shield the Congress.[8] Further, it is not just a question of Congress tolerating the continued existence of tribal governments through inaction. If tribal governments are to be true governments, recognizable as such by the federal courts, they must first be recognized as such by the Congress, in a treaty or statute, or by the Executive pursuant to congressional authority. Absent congressional action, the problem does not even arise. And that fact is itself a large part of the problem. In the final analysis, the Tribes have governmental powers only to the extent that Congress so wills. That, after all, is why the extent of these powers is always a federal question. *Cf. National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

This constitutional issue is really a form of the familiar "state action" issue. *Cf. Marsh v. Alabama*, 326 U.S. 501 (1946), *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). And Solicitor Margold's opinion points the way, we believe, to a

[8]The applicability of the Constitution to the congresional exercise of its treaty-making power with the Indians, and the constitutional difficulties in a broad grant of tribal jurisdiction over non-Indians, were recognized by the Attorney General of the United States 150 years ago. In 2 Op. Atty. Gen. 693 (1834), relied upon in *Oliphant*, 435 U.S. at 199, the Attorney General stated, with regard to the treaty of Dancing Rabbit (7 Stat. 33), entered into with the Choctaws in 1830:

> For the more effectual accomplishment of the same end [creation of a territory for the Choctaws west of the Mississippi], the government and people of the United States, by the 4th article of the treaty, engaged to "secure to the Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits west." If this provision had stopped here, it would have indicated an intention on the part of the framers of the treaty to give to the Choctaws a jurisdiction and government exclusive of all interference by the United States, or any other authority, and broad enough to authorize the particular proceedings now before me; *though it is by no means clear that such a treaty could have been made, or would be valid, under the constitution of the United States.*" 2 Op. Atty. Gen. at 694. (Emphasis supplied.)

solution. Tribal government can apply only to tribal members; but those members are perfectly free to avoid the jurisdiction of that government by becoming non-members. That solution, we suggest is consistent with the understanding of the framers of our Constitution as construed in *Talton v. Mayes, i.e.*, that tribal governments were to continue, if Congress so wished, just as they were before the adoption of that Constitution, exercising jurisdiction over members only, unfettered by the Constitution itself. At the same time, it assures that non-members will not be deprived of the benefit of the Bill of Rights.[9]

The approach in Solicitor Margold's opinion, we would agree, may not be entirely consistent with the *Montana* qualifications, depending, of course, on how broadly they are construed and applied.[10] But the inherent difficulties in applying them to concrete cases such as this one, as well as the constitutional considerations just discussed, may well warrant reexamination of those qualifications. *Cf. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)

[9]Enforcement of the Indian Civil Rights Act by tribal courts is simply no substitute for enforcement of the Bill of Rights by federal and state courts. *See* letter dated January 26, 1988, from John R. Bolton, Assistant Attorney General, U.S. Department of Justice, to Senator Daniel K. Inouye, attached as Appendix B to this brief, for a discussion of the type of treatment litigants are likely to face in tribal courts.

[10]In an opinion issued on October 25, 1934, shortly before his December 13, 1934, opinion discussed above, Solicitor Margold did recognize a type of civil jurisdiction even over non-members. In "Powers of Indian Tribes", he stated that the tribal taxing power" * * * may be exercised over members of the tribe and over non-members, so far as non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." 55 ID 14, at 46 (1934). So long as the tribal sanctions are confined to withdrawal of the privileges which the Tribe is empowered to confer in the first place, we see no constitutional problems in this position, or any inconsistency with Solicitor Margold's subsequent opinon of December 13, 1934, discussed at pp. 15-17, *supra*.

CONCLUSION

For the reasons given above, the petitions for a writ of certiorari, should be granted.

Respectfully submitted,

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APPENDIX A

Note: The use of this list should not be construed as an admission by any of the amici States as to the legal status or boundaries of any particular reservation.

Note: A reservation located in more than one State is listed under each State in which it is located.

RESERVATIONS

Annette Island Reserve

Camp Verde Reservation
Cocopah Reservation
Colorado River Reservation
Fort Apache Reservation
Fort McDowell Reservation
Fort Mojave Reservation
Fort Yuma Reservation
Gila Bend Reservation
Gila River Reservation
Havasupai Reservation
Hopi Reservation
Hualapai Reservation
Kaibab Reservation
Maricopa Reservation
Navajo Reservation
Papago Reservation
Pascua Yaqui Reservation
Payson Community of Yavapai-Apache
Salt River Reservation
San Carlos Reservation
San Xavier Reservation
Yavapai Reservation

Agua Caliente Reservation
Alturas Rancheria
Augustine Reservation
Barona Rancheria
Benton Paiute Reservation
Berry Creek Rancheria
Big Bend Rancheria
Big Lagoon Rancheria
Big Pine Rancheria

STATE	TOTAL PERSONS	TOTAL INDIANS	TOTAL NON-INDIANS
AK	1,195	958	237
AZ	200	173	27
AZ	355	349	6
AZ	7,873	1,965	5,908
AZ	7,774	6,880	894
AZ	349	345	4
AZ	219	127	92
AZ	4,581	1,096	3,485
AZ	-	-	-
AZ	7,380	7,067	313
AZ	282	267	15
AZ	6,906	6,601	305
AZ	849	809	40
AZ	173	93	80
AZ	397	375	22
AZ	110,433	104,968	5,465
AZ	7,203	6,959	244
AZ	562	551	11
AZ	-	-	-
AZ	4,089	2,624	1,465
AZ	6,104	5,872	232
AZ	875	851	24
AZ	76	66	10
CA	13,743	65	13,678
CA	7	7	0
CA	-	-	-
CA	300	222	78
CA	12	12	0
CA	-	-	-
CA	11	8	3
CA	11	8	3
CA	396	269	127

RESERVATIONS	STATE	TOTAL PERSONS	TOTAL INDIANS	TOTAL NON-INDIAN
Bishop Rancheria	CA	1,125	784	341
Bridgeport Colony	CA	55	47	8
Cahazon Reservation	CA	815	8	807
Cachil Dehe Rancheria	CA	17	17	0
Cahuilla Reservation	CA	56	29	27
Campo Reservation	CA	100	86	14
Capitan Grande Reservation	CA	-	-	-
Cedarville Rancheria	CA	6	6	0
Chamehuevi Reservation	CA	265	23	242
Cold Springs Rancheria	CA	65	63	2
Colorado River Reservation	CA	7,873	1,965	5,908
Cortina Rancheria	CA	6	2	4
Coyote Valley Rancheria	CA	9	-	9
Cuyapaipe Reservation	CA	2	2	0
Dry Creek Rancheria	CA	46	41	5
Enterprise Rancheria	CA	16	16	0
Fort Bidwell Reservation	CA	98	93	5
Fort Independence Reservation	CA	61	31	30
Fort Mojave Reservation	CA	219	127	92
Fort Yuma Reservation	CA	4,581	1,096	3,485
Grindstone Creek Rancheria	CA	73	72	1
Hoopa Valley Extension Reservation	CA	1,082	411	671
Hoopa Valley Reservation	CA	2,041	1,502	539
Hopland Rancheria	CA	13	10	3
Inaja-Cosmit Reservation	CA	-	-	-
Jackson Rancheria	CA	15	15	0
La Jolla Reservation	CA	151	141	10
La Posta Reservation	CA	1	1	0
Laytonville Rancheria	CA	111	105	6
Likely Rancheria	CA	-	-	-
Lone Pine Rancheria	CA	248	172	76
Lookout Rancheria	CA	13	12	1
Los Coyotes Reservation	CA	51	45	6
Manchester Rancheria	CA	81	77	4
Manzanita Reservation	CA	14	13	1
Mesa Grande Reservation	CA	-	-	-
Middletown Rancheria	CA	40	39	1
Montgomery Creek Rancheria	CA	1	1	0
Morango Reservation	CA	414	313	101

RESERVATIONS	STATE	TOTAL PERSONS	TOTAL INDIANS	TOTAL NON-INDIAN
Pala Reservation	CA	648	519	129
Pauma Reservation	CA	-	-	-
Pechanga Reservation	CA	141	117	24
Ramona Reservation	CA	-	-	-
Resighini Rancheria	CA	21	18	3
Rincon Reservation	CA	490	297	193
Roaring Creek Rancheria	CA	25	24	1
Round Valley Reservation	CA	1,268	528	740
Rumsey Rancheria	CA	13	11	2
San Manuel Reservation	CA	31	24	7
San Pasqual Reservation	CA	209	133	76
Santa Rosa Rancheria	CA	169	117	52
Santa Rosa Reservation	CA	12	12	0
Santa Ynez Reservation	CA	133	-	133
Santa Ysabel Reservation	CA	196	181	15
Sheep Ranch Rancheria	CA	2	2	0
Sherwood Valley Rancheria	CA	19	17	2
Shingle Springs Rancheria	CA	-	-	-
Soboba Reservation	CA	258	230	28
Stewart's Point Rancheria	CA	75	72	3
Sulphur Bank Rancheria	CA	115	115	0
Susanville Reservation	CA	90	82	8
Sycuan Reservation	CA	61	48	13
Torres-Martinez Reservation	CA	278	11	267
Trinidad Rancheria	CA	63	47	16
Tule River Reservation	CA	453	424	29
Tuolumne Rancheria	CA	93	73	20
Twenty-Nine Palms Reservation	CA	-	-	-
Viejas Rancheria	CA	209	142	67
Woodfords Community	CA	308	126	182
XL Ranch Reservation	CA	24	24	0
Southern Ute Reservation	CO	5,739	855	4,884
Ute Mountain Reservation	CO	1,138	1,111	27
Eastern Pequot Reservation	CT	29	16	13
Golden Hill Reservation	CT	3	3	0
Schaghticoke Reservation	CT	6	2	4

RESERVATIONS	STATE	TOTAL PERSONS	TOTAL INDIANS	TOTAL NON-INDIAN
Western Pequot Reservation	CT	24	6	18
Big Cypress Reservation	FL	387	351	36
Brighton Reservation	FL	338	323	15
Hollywood Reservation	FL	2,592	416	2,176
Miccosukee Reservation	FL	276	1	275
Tama Reservation	GA	33	30	3
Omaha Reservation	IA	5,459	1,275	4,184
Sac and Fox Reservation	IA	509	492	17
Coeur d'Alene Reservation	ID	4,911	538	4,373
Duck Valley Reservation	ID	1,041	932	109
Fort Hall Reservation	ID	4,783	2,542	2,241
Kootenai Reservation	ID	-	-	-
Nez Perce Reservation	ID	17,806	1,463	16,343
Iowa Reservation	KS	112	26	86
Kickapoo Reservation	KS	461	356	105
Pottawatomi Reservation	KS	985	331	654
Sac and Fox Reservation	KS	114	3	111
Chitimacha Reservation	LA	1,300	185	1,115
Coushatta Reservation	LA	-	-	-
Tunica-Biloxi Reservation	LA	63	7	56
Hassanamisco Reservation	MA	1	1	0
Wampanoog Reservation	MA	-	-	-
Indian Township Reservation	ME	423	333	90
Penobscot Reservation	ME	458	398	60
Pleasant Point Reservation	ME	549	504	45
Bay Mills Reservation	MI	322	283	39
Hannahville Community	MI	211	206	5
Isabella Reservation	MI	23,020	517	22,503
L'Anse Reservation	MI	3,289	581	2,708

RESERVATIONS	STATE	TOTAL PERSONS	TOTAL INDIANS	TOTAL NON-INDIAN
Ontonagon Reservation	MI	-	-	-
Pine Creek Reservation	MI	-	-	-
Sault Ste. Marie Reservation	MI	-	-	-
Bois Forte Reservation (Nett Lake)	MN	416	392	24
Deer Creek Reservation	MN	219	7	212
Fond du Lac Reservation	MN	2,853	514	2,339
Grand Portage Reservation	MN	281	187	94
Leech Lake Reservation	MN	8,411	2,759	5,652
Lower Sioux Community	MN	79	65	14
Mille Locs Reservation	MN	37	36	1
Prairie Island Community	MN	111	80	31
Red Lake Reservation	MN	2,979	2,823	156
Sandy Lake Reservation	MN	-	-	-
Shakopee Community	MN	105	77	28
Upper Sioux Community	MN	54	51	3
Vermillion Lake Reservation	MN	116	103	13
White Earth Reservation	MN	9,505	2,554	6,951
Mississippi Choctaw Reservation	MS	2,866	2,756	110
Blackfeet Reservation	MT	6,660	5,080	1,580
Crow Reservation	MT	5,973	3,953	2,020
Flathead Reservation	MT	19,628	3,771	15,857
Fort Belknap Reservation	MT	2,060	1,870	190
Fort Peck Reservation	MT	9,921	4,273	5,648
Northern Cheyenne Reservation	MT	3,664	3,101	563
Other reservation lands in Montana	MT	8	1	7
Rocky Boy's Reservation	MT	1,650	1,549	101
Eastern Cherokee Reservation	NC	5,717	4,844	873
Fort Berthold Reservation	ND	5,577	2,640	2,937
Fort Totten Reservation	ND	3,313	2,261	1,052
Sisseton Reservation	ND	13,586	2,700	10,886
Standing Rock Reservation	ND	8,816	4,800	4,016
Turtle Mountain Reservation	ND	4,311	4,021	290
Iowa Reservation	NE	112	26	86

RESERVATIONS	STATE	TOTAL PERSONS	TOTAL INDIANS	TOTAL NON-INDIAN
Omaha Reservation	NE	5,459	1,275	4,184
Sac and Fox Reservation	NE	114	3	111
Santee Reservation	NE	914	420	494
Winnebago Reservation	NE	2,554	1,140	1,414
Acoma Pueblo	NM	2,359	2,268	91
Alamo Reservation	NM	1,072	1,062	10
Canoncito Reservation	NM	978	969	19
Cochiti Pueblo	NM	839	613	226
Isleta Pueblo	NM	2,412	2,289	123
Jemez Pueblo	NM	1,515	1,504	11
Jicarilla Apache Reservation	NM	1,996	1,715	281
Laguna Pueblo	NM	3,791	3,564	227
Mescalero Apache Reservation	NM	2,101	1,922	179
Nambe Pueblo	NM	386	175	211
Navajo Reservation	NM	110,433	104,968	5,465
Picuris Pueblo	NM	337	116	221
Pojoaque Pueblo	NM	1,191	94	1,097
Ramah Community	NM	1,237	1,163	74
San Felipe Pueblo	NM	2,266	1,789	477
San Felipe/Santa Ana Joint Area	NM	-	-	-
San Felipe/Santo Domingo Joint Area	NM	122	116	6
San Ildefonso Pueblo	NM	1,491	488	1,003
San Juan Pueblo	NM	4,365	852	3,513
Sandia Pueblo	NM	683	217	466
Santa Ana Pueblo	NM	409	407	2
Santa Clara Pueblo	NM	6,740	459	6,281
Santo Domingo Pueblo	NM	2,162	2,139	23
Taos Pueblo	NM	1,421	716	705
Tesuque Pueblo	NM	252	235	17
Ute Mountain Reservation	NM	1,138	1,111	27
Zia Pueblo	NM	524	524	0
Zuni Pueblo	NM	6,291	5,988	303
Carson Colony	NV	227	213	14
Dresslerville Colony	NV	129	127	2
Duck Valley Reservation	NV	1,041	932	109
Duckwater Reservation	NV	106	103	3

RESERVATIONS
Ely Colony
Fallon Colony
Fallon Reservation
Fort McDermitt Reservation
Fort Mojave Reservation
Goshute Reservation
Las Vegas Colony
Lovelock Colony
Moapa River Reservation
Pyramid Lake Reservation
Reno-Sparks Colony
Summit Lake Reservation
Te-Moak Reservation
Walker River Reservation
Washoe Reservation
Winnemucca Colony
Yerington Reservation
Yomba Reservation
Allegany Reservation
Cattaraugus Reservation
Oil Springs Reservation
Onondaga Reservation
Poospatuck Reservation
Shinnecock Reservation
St. Regis Mohawk Reservation
Tonawanda Reservation
Tuscarora Reservation
Osage Reservation
Burns Reservation
Fort McDermitt Reservation
Umatilla Reservation
Warm Springs Reservation
Catawba Reservation
Cheyenne River Reservation

STATE	TOTAL PERSONS	TOTAL INDIANS	TOTAL NON-INDIAN
NV	78	67	11
NV	64	46	18
NV	279	258	21
NV	472	463	9
NV	219	127	92
NV	105	105	0
NV	113	106	7
NV	126	117	9
NV	185	182	3
NV	853	720	133
NV	463	451	12
NV	-	-	-
NV	91	91	0
NV	571	471	100
NV	87	4	83
NV	37	35	2
NV	421	105	316
NV	60	57	3
NY	7,681	925	6,756
NY	1,994	1,855	139
NY	6	-	6
NY	596	592	4
NY	203	94	119
NY	297	194	103
NY	1,802	1,763	39
NY	467	438	29
NY	921	873	48
OK	39,327	4,749	34,578
OR	167	160	7
OR	472	463	9
OR	2,619	908	1,711
OR	2,244	2,004	240
SC	998	728	270
SD	1,826	1,529	297

RESERVATIONS	STATE	TOTAL PERSONS	TOTAL INDIANS	TOTAL NON-INDIAN
Crow Creek Reservation	SD	1,787	1,474	313
Flandreau Reservation	SD	169	158	11
Lower Brule Reservation	SD	1,023	850	173
Pine Ridge Reservation	SD	13,143	11,882	1,261
Rosebud Reservation	SD	7,328	5,688	1,640
Sisseton Reservation	SD	13,586	2,700	10,886
Standing Rock Reservation	SD	8,816	4,800	4,016
Yankton Reservation	SD	6,541	1,688	4,853
Alabama-Coushatta Reservation	TX	504	494	10
Tigua Reservation	TX	503	-	503
Goshute Reservation	UT	105	105	0
Navajo Reservation	UT	110,433	104,968	5,465
Skull Valley Reservation	UT	13	13	0
Southern Paiute Reservation	UT	1,217	196	1,021
Uintah and Ouray Reservation	UT	16,909	2,050	14,859
Pamunkey Reservation	VA	59	50	9
Chehalis Reservation	WA	405	200	205
Colville Reservation	WA	7,047	3,500	3,547
Hoh Reservation	WA	67	46	21
Kalispel Reservation	WA	106	98	8
Lower Elwah Reservation	WA	67	47	20
Lummi Reservation	WA	2,274	1,259	1,015
Makah Reservation	WA	1,245	803	442
Muckleshoot Reservation	WA	2,991	375	2,616
Nisqually Reservation	WA	254	42	212
Nooksack Reservation	WA	-	-	-
Ozette Reservation	WA	6	1	5
Port Gamble Reservation	WA	302	266	36
Port Madison Reservation	WA	3,415	148	3,267
Puyallup Reservation	WA	25,188	856	24,332
Quileute Reservation	WA	327	273	54
Quinault Reservation	WA	1,501	943	558
Sauk-Suiattle Reservation	WA	-	-	-
Shoalwater Reservation	WA	33	28	5
Skokomish Reservation	WA	483	305	78

RESERVATIONS

Spokane Reservation
Squaxin Island Reservation
Swinomish Reservation
Tulalip Reservation
Upper Skagit Reservation
Yakima Reservation

Bad River Reservation
Lac Courte Oreilles Reservation
Lac du Flambeau Reservation
Menominee Reservation
Oneida Reservation
Patawatomi Reservation
Red Cliff Reservation
Sokaogon Chippewa Community
St. Croix Reservation
Stockbridge Reservation
Wisconsin Winnebago Reservation

Wind River Reservation

STATE	TOTAL PERSONS	TOTAL INDIANS	TOTAL NON-INDIAN
WA	1,475	1,050	425
WA	56	35	21
WA	1,390	414	976
WA	5,046	768	4,278
WA	5	-	5
WA	25,363	4,983	20,380
WI	916	699	217
WI	1,699	1,145	554
WI	2,211	1,092	1,119
WI	2,672	2,377	295
WI	13,389	1,821	11,568
WI	224	220	4
WI	686	589	97
WI	105	95	10
WI	427	392	35
WI	1,272	582	690
WI	658	579	79
WY	23,157	4,150	19,007

APPENDIX B

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General — *Washington, D.C. 20530*

26 Jan. 1988

Honorable Daniel K. Inouye
Chairman
Select Committee on Indian Affairs
United State Senate
Washington, D.C. 20510

Re: *S. 1703 and the Indian Civil Rights Act*

Dear Mr. Chairman:

This supplements our letter of October 27, 1987 concerning S. 1703, a bill to amend the Indian Self-Determination and Education Assistance Act. We said then, and remained convinced now, that tribal programs funded by this Act may fail to comply fully with the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.* (P.L. 90-284, Title II of the Act of April 11, 1968, 88 Stat. 77). We propose to grant federal courts, following the exhaustion of tribal remedies, limited authority to enforce the ICRA. Specifically, we suggest adding the following new section to S. 1703:

"Sec. ___ . Compliance with the Indian Civil Rights Act.

"Title I of the Indian Self-Determination and Education Assistant Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended by adding the following new section 112:

"Sec. 112. (a) Any program or activity receiving federal financial assistance from the Secretary of the Interior or from the Secretary of Health and Human Services pursuant to this Title shall be administered in compliance with the Indian Civil Rights Act of 1968 (Public Law 90-284, Act of April 11, 1968, 82 Stat. 77).

"(b) Federal district courts shall have jurisdiction of civil actions alleging the failure of programs or activities funded by this Act to comply with § 202 of Title II

of the Civil Rights Act of 1968 (Public Law 90-284, Act of April 11, 1968, 82 Stat. 77).

"(c) Any aggrieved person, following the exhaustion of such tribal remedies as may be both timely and reasonable under the circumstances, or the Attorney General on behalf of the United States, may initiate an action in the appropriate federal district court for equitable relief against an Indian tribe, tribal organization, or official thereof, alleging a failure to comply with subparagraphs (a) and (b) above. Tribal sovereign immunity shall not constitute a defense to such an action."

The language we suggest grants federal district courts jurisdiction, following the exhaustion of tribal remedies, of complaints that federally funded tribal programs violate the ICRA. The proposed amendment is limited to federally funded tribal programs; tribal activities which do not receive federal dollars remain unaffected. For the reasons spelled out below, we urge the Select Committee to adopt the proposed amendment to S. 1703.

1. The Need To Condition S. 1703 On Compliance With The ICRA

S. 1703 amends the current law to aid Indian tribes in providing important government services to their members. Under the Act, Indian tribes may choose to provide services such as health care, education, social welfare benefits, law enforcement, judicial services, employment assistance and other government services to many of the nation's nearly one million eligible Indians. Funding is provided by the United States pursuant to contracts between tribes and various federal agencies. The program is substantial; the Bureau of Indian Affairs alone estimates that in fiscal 1988 its self-determination contracts with Indian tribes will total 308 million dollars. Absent the language we propose, or an equally effective remedy, we believe the beneficiaries of programs funded by this Act may be denied the protection of federal law.

Beneficiaries of federal programs generally are protected by broad, well-defined constitutional rights and the full range of federal civil rights legislation. Furthermore, federal courts are routinely available to enforce rights secured by federal civil rights statutes or the Constitution. Beneficiaries of programs funded under this Act, however, are limited to the protections contained in the ICRA. Constitutional safeguards are largely unavailable. *Talton v. Mayes*, 163 U.S. 376 (1896). While the ICRA contains many of the protections found in the Constitution, except for habeas corpus it is unenforceable in federal courts. Tribal forums enjoy exclusive jurisdiction of civil actions brought to enforce the ICRA. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Although some post *Santa Clara* litigants indirectly sought to redress tribal grievances by suing federal officials in district court, few such suits have achieved their objective in a timely manner. See, *e.g.*, *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985) and *Wheeler v. United States Department of Interior*, 811 F.2d 549 (10th Cir. 1987).

While tribal measures to enforce the ICRA may be available in theory, such remedies are often unavailable in practice. Since the Supreme Court's decision in *Santa Clara Pueblo*, several federal court opinions, two major news articles and the Report of the Presidential Commission on Indian Reservation Economies have all questioned the fairness or availability of ICRA enforcement in tribal court. In addition, serious allegations of ICRA violations surfaced recently in hearings held by the United States Commission on Civil Rights. In testimony taken in Washington, D.C., Rapid City, South Dakota, and Flagstaff, Arizona, a number of Indians shared important evidence of tribal non-compliance with the ICRA.

This Department's substantial interest in ICRA compliance, see, e.g., 28 CFR § 0.50(a)—indeed, our conviction that all federal civil rights statutes must be aggressively enforced—compels us to add our voice to those who find a failure to fully enforce the ICRA post *Santa Clara Pueblo*.

2. Tribal Failure to Enforce The ICRA Post *Santa Clara Pueblo*

For 10 years prior to *Santa Clara Pueblo*, the ICRA was routinely enforced in both tribal and federal courts, with little if any adverse effect on tribal government. Federal court review ended, however, with the Supreme Court's 1978 decision in *Santa Clara Pueblo* that federal courts lack non-habeas corpus jurisdiction over ICRA cases. Although the Court found that the ICRA "has the substantial and intended effect of changing the law which [tribal] forums are obliged to apply", *Id.* at 65, enforcement was limited to tribal forums and remedies.

Substantial evidence now exists that tribal forums may not, as the Supreme Court assumed in *Santa Clara Pueblo*, "vindicate rights created by the ICRA". *Id.* Tribal remedies under the ICRA are often inadequate; they fail to fully protect individuals from the arbitrary and unfair action of tribal government, including tribal programs and activities funded by the Self-Determination and Education Assistance Act. According to the Presidential Commission On Reservations Economies, "the politicization of tribal courts [by tribal governments] * * * discriminate[s] unfairly against individuals and businesses." *Report and Recommendation To The President Of The United States*, Presidential Commission On Indian Reservation Economies, November 1984, Part Two at 36. Three factors contribute to this result: first, judicial review may be unavailable; second, tribal sovereign immunity and other jurisdictional impediments may bar or limit ICRA relief; and, third, tribal governing bodies interfere with tribal courts.

A. The Lack Of Judicial Review

Tribal courts lack clear authority to review tribal government action. In some tribes, judicial review may be unavailable. See *e.g.*, *Santa Clara Pueblo*, *supra*. In other tribes judicial review may be limited. The Cheyenne River Sioux

Tribe, for example, is one of several tribes which explicitly reserve final authority over tribal action to tribal councils and not tribal courts. A recent Cheyenne River resolution states in part:

> BE IT FINALLY RESOLVED, that the Council shall retain the power to review the decision of the Tribal Court of Appeals on issues of law under such conditions and procedures as are found by the Council to be appropriate.

Cheyenne River Sioux Tribal Resolution No. 213-85-CR. Similarly, Oglala Sioux Tribal Resolution No. 87-76 provides in part:

> WHEREAS, the Oglala Siox Tribe has reviewed the actions of the Tribal Court and Tribal Court of Appeals in the *Moore* case and find that the said courts have exceeded their authority under Ordinance No. 86-09, now
>
> THEREFORE BE IT RESOLVED, that the Oglala Sioux Tribal Council hereby declares that all court orders in the case of *Margaret Moore v. Oglala Sioux Tribal Personnel Board, et al.* are hereby declared null and void * * * .

Although the rule may not be as clear elsewhere, "[i]n at least 27 tribes the council hears appeals from tribal court judgment * * * ." American Indian Lawyer Training Program, *Indian Self-Determination And The Role Of Tribal Courts*, 1977, at 59. In fact, tribal courts are available in only about one half of the nation's nearly 300 federally recognized Indian tribes.

As a result, the same tribal body which takes action is often called upon to determine its propriety. The Eighth Circuit in *Runs After v. United States*, *supra*, citing Justice White's dissent in *Santa Clara Pueblo*, notes parenthetically that "* * * given congressional concern about deprivations of individual Indians' rights by tribal authorities, [it is] improbable that Congress desired enforcement of rights to be left to the very tribal authorities alleged to have violated them." *Id.* at 353.

B. Sovereign Immunity And Other Jurisdictional Impediments To ICRA Enforcement In Tribal Court

In *Santa Clara Pueblo*, the Court found that "[t]ribal forums are available to vindicate rights created by the ICRA, and [the Act] has the substantial and intended effect of changing the law these forums are obliged to apply". *Santa Clara Pueblo, supra*, at 65. The clear implication is that tribal courts, where they exist, are available to enforce the ICRA. However, in addition to those tribes which have no court or refuse to permit full judicial review, other tribes rely on the doctrine of sovereign immunity or jurisdictional limitations to bar judicial enforcement of rights secured by the ICRA. For example, Cheyenne River Chairman Morgan Garreau provided the following testimony to the Civil Rights Commission:

> MS. MILLER: Do you believe that sovereign immunity is a bar to Indian Civil Rights Act claims against the tribe [in tribal court]?
>
> MR. GARREAU: Yes, I do. [The question] has come to the tribal council with regard to [a] waiver of sovereign immunity. As I stated, I sat on the tribal council. I served as administrative officer. At no time during those years, I believe from 1979 to the present [i.e., 1986], has the tribal council ever waived sovereign immunity for anyone, for any case or cause at all.
>
> MS. MILLER: So what that means is you are saying that the Indian Civil Rights Act really is unenforceable as against the tribe?
>
> MR. GARREAU: Unless the council waives sovereign immunity.
>
> MS. MILLER: Which it hasn't done.
>
> MR. GARREAU: No, they have not, for anyone.

Hearings, *supra*, at p. 377.

Cheyenne River is not an isolated case. Tribal court decisions which dismiss ICRA cases by invoking sovereign immunity have occurred in a number of jurisdictions. For example, in *Satiacum v. Sterud et al.*, No. 82-1157 (Puy. Tr.

Ct., April 23, 1983), 10 Indian L. Rep. 6013, the Puyallup Tribal Court rejects the argument that *Santa Clara Pueblo* "represents an explicit waiver of the tribe's immunity" in an ICRA action in tribal court. *Id* at 6015. In *Dubray v. Rosebud Housing Authority*, No. CIV83-01 (Rosebud Sioux Tr. Ct., Feb 1, 1985), 12 Indian L. Rep. 6015 (app. pndg., Intertribal Ct. of App.), the tribal court found "no provision in the tribal code which would waive the tribe's immunity to suits based on claims under the [ICRA]". *Id.* Therefore, the tribal court continued, "because the tribe's immunity has not been waived, the plaintiff's [ICRA] complaint * * * must be dismissed." *Id.* See also, *Whatoname v. Hualapai Tribe et al.*, Civil No. 003-80 (Hualapai Ct. of App., May 11, 1981) (The tribal court dismissed an ICRA case commenting that "[i]t is difficult for this Court to fathom how the Indian Civil Rights Act can be said to waive the immunity of the Tribe in its own Courts by implication while such waiver by implication was expressly rejected by the federal courts * * *". Slip o. at 8.); *Garman v. Fort Belknap Community Council, et. al.*, No. CV83-238, (Ft. Blkp Tr. Ct., Jan. 20, 1984), 11 Indian L. Rep. 6017 (ICRA case dismissed against tribal defendants with the observation that the tribe has "not chosen to expressly waive tribal sovereign immunity to allow enforcement of the Indian Civil Rights Act in tribal courts * * *"); and the cases cited by Johnson and Madden, *Sovereign Immunity In Indian Tribal Law*, 12 Am. Indian L. Rev. at 167, n. 59 (1984).

In those cases where sovereign immunity presents no bar to ICRA enforcement, other jurisdictional considerations may intervene. For example, tribal court civil jurisdiction may be limited to cases in which both parties are members of the tribe or each consent to tribal court jurisdiction. See, *e.g.*, 25 CFR §11.22C (The Interior Department's Court of Indian Offenses, which is similar to tribal courts, has "jurisdiction of all suits wherein the parties to the action are members of the tribe * * * and of all other suits between members and non-members which are brought before the court by stipulation of both parties.").

C. Separation Of Powers—The Lack Of Tribal Court Independence

Tribal governing bodies may interfere with the process of tribal courts. The 1984 Report of the Presidential Commission on Indian Reservation Economies found that

> failure [of tribal governments] to adhere to a constitutional principle separating executive, legislative and judicial powers has had a detrimental effect on [tribal] governmental functioning. For example, the failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the rule of law.

Report And Recommendations To The President Of The United States, *supra*, Part One, at 29. The Presidential Commission, co-chaired by Ross O. Swimmer, further finds that

> [b]oth Indians and non-Indians complain of political discrimination against them by tribal governments and by tribal courts which are arms of tribal governments. Access to tribal physical resources, to the benefits of tribally managed programs, and to tribal employment is considered to be unfair by many Indians. Decisions rendered by tribal courts, which are controlled by tribal councils, are also perceived to be unfair by Indians and non-Indians.

Id., Part Two at 36.

Recent hearings before the United States Commission on Civil Rights provide further evidence that tribal courts may be incapable of enforcing rights secured by the ICRA. Former Chief Judge Trudell Guerue of the Rosebud Sioux Tribal Court wrote that there is an "absence of any forum in which the Indian Civil Rights Act is enforceable." Guerue, *The Indian Civil Rights Act — How it is Used As License And Not As Protection*, 1986, at 3 (unpublished paper in the files of the United States Commission On Civil Rights). This is true, according to Guerue, because tribal councils control

tribal courts; "removal from office or the bench is not an uncommon tribal council tool." *Id.*, at 4. This lack of judicial independence or separation of tribal powers was echoes by a number of other Indian judges. For example, former Tribal Judge Walter Woods of the Cheyenne River Sioux Tribe testified before the Civil Rights Commission that tribal

> judges are politically appointed so they can be controlled by the council. If they make decisions that are not favorable with the council, then they will be removed without a hearing—because I know; I was one of the individuals that was removed.

Hearings before the United States Commission on Civil Rights, Rapid City, S.D., 1986, at 392. Former Cheyenne River Sioux Tribal Chairman Garreau confirmed that "[a]ll it takes is just an action of the tribal council to remove a judge." *Id.* at 383.

A number of federal court decisions further underscore the lack of an independent tribal judiciary. In *Shortbull v. Looking Elk*, 677 F.2d 645 (8th Cir. 1982), a panel of the Eight Circuit noted that "because of [a tribal court] ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the tribal Executive Committee, who quashed Judge Red Shirt's orders." *Id.* at 650. As a result, "[w]e are thus presented with a situation in which [the plaintiff] has no remedy within the tribal machinery * * *" *Id.* Similarly, in *Runs After v. United States*, *supra*, the Eighth Circuit found that after the tribal court upheld a contested voting redistricting plan

> the Tribal Council terminated the tribal court judge, allegedly because of the decision enforcing the reapportionment, rescinded the tribal court order directing elections to be held in thirteen election districts, and appointed a new tribal court judge.

Id. at 348. In addition, the tribe "forever barred" the judge who was removed in *Runs After* from tribal political office. Resolution No. 190-84-CR, Cheyenne River Sioux Tribe, July 12, 1984. "Abuse of power by tribal governments is wide-

spread", according to former Tribal Judge Guerue. Guerue, *supra*, at 3.

3. The Need To Expand The Federal Court's ICRA Jurisdiction

With the exception of habeas corpus authority found in §1303 of the ICRA, 25 U.S.C. §1303, federal courts lack jurisdiction of ICRA complaints. Enforcement is left exclusively to tribal forums. However, the Supreme Court's finding that these tribal forums are "available to vindicate rights created by the ICRA" has not proved accurate. *Santa Clara Pueblo*, *supra*, at 65. The lack of judicial review, sovereign immunity, jurisdictional barriers and tribal council interference with tribal courts are some of the factors which impede full tribal enforcement of rights secured by the ICRA.

Several federal court decisions recognize the anomaly of creating statutory rights without an adequate enforcement mechanism or remedy. In *Garreaux v. Andrus*, 676 F.2d 1206 (8th Cir. 1982), for example, the Eight Circuit acknowledged "that the plaintiffs are being treated unfairly by the tribal council" but, citing *Santa Clara Pueblo*, went on to hold that federal courts lack statutory authority to consider ICRA claims. *ID.* at 1210, n. 2. See also, *Shortbull v. Looking Elk*, *supra*; and *R.J. Williams Co. v. Fort Belknap Housing Authority*, 509 F. Supp. 933 (D.C. Mont. 1981), Rev'd and remanded on other grounds, 719 F.2d 979 (9th Cir. 1983) ("This case illustrates the absurd results that the broad rule of [*Santa Clara Pueblo*] can cause." 509 F. Supp. at 939).

Courts, however, properly defer to congressional action. In *Kickapoo Tribe v. Thomas*, No. 83-4177 (D. Kan., June 24, 1983), 10 Indian L. Rep. 3093, the court found that it is beyond the power of the judiciary "to determine whether [ ] congressional Indian policy fosters self-government or a vacuum with the potential for chaos." *Id.* at 3096. In *Wells v. Philbrick*, 486 F. Supp. 807 (1980), the court went one step further adding

> [i]t certainly may be argued that the effect, after *Santa Clara Pueblo*, of the ICRA is to create rights while withholding any meaningful remedies to enforce them. [citation omitted], but it is for Congress, not the Courts, to resolve this state of affairs [citing *Santa Clara Pueblo*, *supra*, at 72].

Id. at 809.

Evidence of the tribal failure to fully enforce the ICRA is important because, as the Court noted in *Santa Clara Pueblo*,

> Congress' authority over Indian matters is extraordinarily broad * * * Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [the ICRA], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions.

Santa Clara Pueblo, *supra*, at 72. In fact, the Presidential Commission on Indian Reservation Economies has made such a recommendation. The Commission, in its November 1984 report, recommends

> that legislation be provided for appellate review of tribal court decisions to the federal court system where constitutional or statutory rights are involved.

Report And Recommendations To The President, *supra*, Part One at 30. Profession Wilkinson adds support for such a view when he argues "that federal judicial review of tribal action is often appropriate and perhaps should be expanded". Wilkinson, *American Indians, Time, and the Law*, Yale Univ. Press, 1987, at p. 113 (1987). A similar view was voiced by Gover and Laurence. In discussing the need to modify both *Santa Clara Pueblo* and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), they suggest that:

> [t]he legislative branch seems well-suited to judge the sophistication of Indian judicial systems * * *. [A legislative] modification of [*Santa Clara*] to grant a careful and not overly disruptive federal oversight of [tribal] jurisdiction might be acceptable. We leave the details of such legislation in the capable hands of Congress * * *.

> It would place a scalpel back in the federal judge's hand
> * * *

Avoiding Santa Clara Pueblo v. Martinez: The Litigation In Federal Court Of Civil Actions Under The Indian Civil Rights Act, 8 Hamlin L. Rev. 497, 523 (1985). See also, *Final Report Of Task Force Number 9*, American Indian Policy Review Commission, September, 1976, at p. 35 (The standards set by Congress in the ICRA permit federal courts to be "sensitive" to tribal concerns and such a process has a "salutary" effect on federal court construction of the Act).

A number of tribal judges also recognize the need for federal court ICRA jurisdiction. Judge Sambroak of the Rosebud Sioux Tribal Court provided the following testimony to the Civil Rights Commission:

> MR. MCDONALD: Do you believe the ICRA should be amended to allow [a] private right of action in federal court?
>
> JUDGE SAMBROAK: Yes.

Hearings, *Supra*, at 250. Chief Judge Lorraine Rousseau of the Sisseton Wahpeton Sioux Tribal Court echoed the same theme when she told the Civil Rights Commission:

> I guess what I'm saying is there may be a need for limited jurisdiction by the federal courts in certain cases.

Testimony Before the United States Commission on Civil Rights, Washington, D.C., February, 1986 at 196.

4. Conclusion

Santa Clara Pueblo, which held that federal courts lack jurisdiction after 10 years of effective ICRA enforcement, was premised on the assumption that "[t]ribal forums are available to vindicate rights created by the ICRA." *Santa Clara Pueblo*, *supra*, at 65. Since the record now shows serious tribal "deficien[cies] in applying and enforcing" the ICRA, we look to Congress, as did the Court in *Santa Clara Pueblo*, to permit "civil actions for injunctive or other relief to redress violations of [the ICRA]." *Id.* at 72. Systemic, institu-

tional factors, including sovereign immunity and the lack of judicial independence, often limit the ability of tribal forums, as a practical matter, to remedy violations of the ICRA. Further, many tribes, not just a few suffer from these systemic impediments to effective tribal enforcement of the ICRA. Accordingly, we urge the Select Committee to include language in S. 1703, along the lines set out above, which grants federal courts limited jurisdiction of complaints that federally funded tribal programs violate the ICRA.

The Office of Management and Budge had advised this Department that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

JOHN R. BOLTON
Assistant Attorney General
Office of Legislative Affairs

FILED
AUG 3 1988
JOSEPH F. SPANIOL
CLERK

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1987

No. 87-1622

PHILIP BRENDALE,

Petitioner,

v.

CONFEDERATED BANDS AND TRIBES OF YAKIMA INDIAN NATION, et. al.,

Respondents.

No. 87-1697

STANLEY WILKINSON,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

No. 87-1711

COUNTY OF YAKIMA, et. al.,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petitions Filed: 87-1622, March 31, 1988; 87-1697 and 87-1711, April 11, 1988
Certiorari Granted June 20, 1988

81 4 foldouts

INDEX

Relevant District Court Docket Entries, Whiteside I	1
Relevant District Court Docket Entries, Whiteside II	4
Relevant Ninth Circuit Docket Entries, Whiteside I, 85-4316	7
Relevant District Court Docket Entries, Whiteside I, 85-4433	11
Relevant Ninth Circuit Docket Entries, Whiteside II	12
Complaint, Whiteside I, Filed Sept. 12, 1983	13
Second Supplemental Affidavit of Defendant-Brendale In Support Of His Motion For Reconsideration, Whiteside I, Filed Sept. 19, 1985	24
Complaint, Whiteside II, Filed Oct. 28, 1983	26
Plaintiff's Exhibit No. 006, Whiteside II, Yakima Indian Nation Amended Zoning Regulations. (also Ex. 006 in Whiteside I)	38
Photoreduction of Defendant Yakima County's Exhibit No. 200, Whiteside II, Map of the Yakima Indian Nation showing boundary line between the "open" and "closed" areas and pattern of land tenure. Mylar overlay showing county zoning is deleted.	79

The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages of the appendices to the Petitions for Certiorari in Nos. 87-1622, 87-1697, and 87-1711, which are consolidated before this Court:

No. 87-1622, Brendale v. Confederated Bands and and Tribes, et.al. (Whiteside I)

Transcript, District Court Oral Decision, Feb. 2, 1984	40
District Court Opinion Sept. 10, 1985	64
Order Denying Brendale's Amended Motion for Reconsideration Filed Nov. 5, 1985	131
Order Denying Defendant Brendale's Motion Under Rule 60b, FRCP, Filed Nov. 19, 1985	133
Ninth Circuit Opinion, Whiteside I and II, Sept. 21, 1987	1
Order Supplementing Record and Denying Petition for Rehearing, Whiteside I and II, Filed Jan. 13, 1988	217

No. 87-1697, Wilkinson v. Confederated Tribes and Bands (Whiteside II) and, No. 87-1711, County of Yakima, et.al., v. Confederated Tribes and Bands (Whiteside II)

Transcript, District Court Oral Decision, June 8, 1984	87-1697 87-1711	80a 43-A
District Court Opinion, Sept. 11, 1985	87-1697 87-1711	33a 19-A

Ninth Circuit Opinion, Whiteside I & II, Sept. 21, 1987	87-1697 87-1711	3a 1-A
Order Supplementing Record and Denying Petition for Rehearing, Whiteside I & II	87-1697 87-1711	1a 17-A
District Court Opinion, Whiteside I, Sept. 10, 1985	87-1697	108a

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
(Whiteside I)

C-83-604-JLQ, Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, et.al.

DATE	NR	PROCEEDINGS
1983		
Sep. 12	1	COMPLAINT For Declaratory And Injunctive Relief And Damages — issued summons
Oct. 13	36	ANSWER AND COUNTER-CLAIM of Defendants — Brendale and Glaspey
Oct. 17	37	ANSWER of Deft's Whiteside, Tollefson, Klarich and Anderwald to Complaint for Declaratory and Injunctive Relief and Damages
Dec. 21	58	MOTION to Intervene (Deft. Stanley L. Wilkinson)
1984		
Jan. 9	83	ORDER (JLQ) (denying # 58 but allowing Wilkinson to participate in this matter as an amicus curiae)
Jan. 24	97	PLTF'S REPLY to Counterclaim of Deft Brendale and Glaspey
Jan. 30	112	*ANSWER OF Deft's Whiteside, Tollefson, Klarich and Anderwald to Complaint for Declaratory and Injunctive Relief and Damages
Feb. 10	127	ORDER Dismissing Deft Glaspey (Frank Glaspey dismissed with prejudice and without cost) (JLQ)
Mar. 14	134	AFFIDAVIT (Brendale)
Mar. 19	135	SUPP. AFFIDAVIT of Deft-Brendale in Support of his "Motion for Reconsideration"

Date	NR	Proceedings
1985		
Sep. 11	140	MEMORANDUM OPINION (JLQ) (judgment shall be entered in favor of Plaintiff against all defendants (except Frank Glaspey) to the following extent: The court declares that the Yakima Indian Nation has exclusive regulatory jurisdiction over the land use of the Brendale property described on page 12 of this memorandum opinion. As to pltf's 42 USC 1983 claims judgment shall be entered in favor of defendants Jim Whiteside, Graham Tollefson, Charles Klarich, Richard Anderwald, Philip Brendale and Frank Glaspey. Pltf's 42 USC 1983 claims are dismissed with prejudice. All parties shall bear their own attorney fees)
Sep. 11	141	JUDGMENT IN A CIVIL CASE (that judgment is entered in favor of pltf against all defts (except Frank Glaspey) to the following extent: The Court declares that the Yakima Indian Nation has exclusive regulatory jurisdiction over the land use of the Brendale property described on page 12 of the foregoing Memorandum Opinion. As to plaintiff's 42 USC 1983 claims, judgment is entered in favor of Defts Jim Whiteside, Graham Tollefson, Charles Klarich, Richard Anderwald, Philip Brendale and Frank Glaspey. Plaintiff's 42 USC 1983 claims are dismissed with prejudice. All parties shall bear their own attorneys fees)

Date	NR	Proceedings
Sep. 19	142	AMENDED MOTION FOR RECONSIDERATION (Deft Brendale)
Oct. 23	148	MOTION For Reconsideration (deft)
Nov. 5	152	ORDER DENYING Defendant Brendale's Amended Motion for Reconsideration (JLQ)
Nov. 8	153	NOTICE OF APPEAL (deft Brendale atty Flower)
Nov. 20	155	ORDER denying deft Brendale's Motion Rule 60(b) FRCP
Dec. 19	157	NOTICE OF APPEAL (deft. Brendale atty Flower)

*This is an AMENDED ANSWER

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
(Whiteside II)

C-83-724-JLQ, Confederated Tribes and Bands of the Yakima Indian Nation vs. County of Yakima, et. al.

Date	NR	Proceedings
1983		
Oct. 28	1	COMPLAINT For Declaratory And Injunctive Relief And Damages — issued summons
Nov. 21	3	ANSWER of Defendant Stanley Wilkinson
Dec. 2	8	SUMMONS — served all defts
Dec. 9	21	ANSWER, CROSS-CLAIM & COUNTERCLAIM (defts Gatliff & Keller)
Dec. 9	22	ANSWER of Defts Yakima County, Whiteside, Tollefson, Klarich & Anderwald
1984		
Jan. 3	27	ANSWER to Cross-Claim (Deft Yakima Co., et. al.)
Apr. 13	49	ANSWER to Defendants Gatliff and Keller's Counterclaim
May 14	70	ORDER DISMISSING CROSS-CLAIMS (JLQ) (Defts' Gatliff and Keller's cross-claims against co-defendants Wilkinson, Anderwald, Klarich, Tollefson, Whiteside and the County of Yakima are dismissed without prejudice)
June 8	81	REPORTER'S TRANSCRIPT — FINDINGS OF FACT AND CONCLUSIONS OF LAW (Y/JLQ)

Date	NR	Proceedings
1985		
Sep. 11	100	MEMORANDUM OPINION (JLQ) (the court declares that the Yakima Nation has no authority to exercise regulatory jurisdiction over the land use of the Wilkinson property described in this memorandum opinion. Plts's request for declaratory and injunctive relief is denied and its regulatory jurisdiction claim is dismissed with prejudice. Yakima County's Declaration of Non-Significance is affirmed and pltf's pendent state SEPA claim is dismissed with prejudice)
Sep. 11	101	JUDGMENT IN A CIVIL CASE (that the Yakima Nation has no authority to exercise regulatory jurisdiction over the land use of the Wilkinson property described in the preceding Memorandum Opinion. Plaintiff's request for declaratory and injunctive relief is denied and its regulatory jurisdiction claims is dismissed with prejudice. Yakima County's Declaration of Non-Significance is affirmed and plaintiff's pendent state SEPA claim is dismissed with prejudice)
Sep. 20	102	MOTIONS TO AMEND JUDGMENT, Findings and Decision Filed September 11, 1985 and NOTICE of Argument (10/21/85 Y/JLQ) Denied 10-21-85

Nov. 5	108	ORDER DENYING PLAINTIFF'S Motion to Amend Judgment (JLQ)
Nov. 29	114	NOTICE OF APPEAL (pltf atty Hovis) cc's 9CCA, attys Hovis, Sullivan, Johnsen, Carlson & Berg w/certificate of service

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Whiteside I)

85-4316, Confederated Tribes and Bands of the Yakima Indian Nation, Plaintiff Appellee, v. Jim Whiteside, Graham Tollefson, Charles Klarich, Richard Anderwald, Defendants and Phillip Brendale, Defendant-Appellant. DC No C83-604 JLQ, Notice of Appeal Filed 11/08/85; Consolidated: 85-4433, 85-4383

Date	Filings-Proceedings
1985	
Nov. 12	DOCKET NUMBER ASSIGNED.
1986	
Feb. 18	Filed CERTIFICATE OF RECORD (02-07-86)
Mar. 14	Filed order (CONFATT, SMJ) (1) These appeals are consolidated, 85-4316, 85-4433, 85-4383.
Nov. 7	FILED as of 02-18-86, CERTIFIED TRANSCRIPT OF RECORD ON APPEAL IN 4 VOLUMES, VOLUMES 1 thru 3 PLEADING (COPY), VOLUME 4 RTS (ORIGINAL) (sent directly to judge)
Nov. 12	AS OF NOV. 6 ARGUED & SUBMITTED before: SKOPIL, FLETCHER & POOLE, CJJ.

1987

Sept. 21 ORDERED OPINION (FLETCHER) FILED & JUDGMENT TO BE FILED AND ENTERED.

Sept. 21 Filed opinion — the district court's judgment in Whiteside I is affirmed. Its judgment is Whiteside II is reversed and remanded.

Sept. 21 Filed & Entered Judgment.

Oct. 5 Filed orig & 40 aplt's (Brendale) petition for rehearing en banc. (PANEL & ACTIVE JUDGES) 10/2

Oct. 5 Filed in 85-4383, orig & 40 aplees' (County of Yakima, et.al.) petition for rehearing en banc. (PANEL & ACTIVE JUDGES) 10/2

Date	Filings-Proceedings

Oct. 19 Filed Original and 40 copies of appellees' (Yakima, et.al.,) motion to supplement petition for rehearing and suggestion for rehearing en banc. (PANEL) (remaining motions on shelf), served on 10-16-87.

1988

Jan. 13 Filed order (SKOPIL, FLETCHER, POOLE) The request of County of Yakima to suppl. its petition for rehearing is granted. The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Jan. 19 Filed appellees (BRENDALE) motion for stay of mandate pending application for writ of certiorari, served on 1/18/88

Jan. 19 Filed appellees motion for stay of mandate pending application for writ of certiorari, served on 1/18/88

Feb. 2 Filed order (FLETCHER) The motion of Appellees County of Yakima, et. al., for an order staying issuance of the mandate pursuant to FRAP 41(b) is granted. Stay of mandate be for thirty days to be continued upon the filing of the Petition for Writ of Certiorari until final disposition by the Supreme Court.

Date	Filings-Proceedings
Feb. 2	Filed order (FLETCHER) The motion of Appellant Brendale for an order staying issuance of the mandate pursuant to FRAP 41(b) is granted. Stay of mandate shall be for thirty days to be continued upon the filing of the Petition for Writ of Certiorari until final disposition by the Supreme Court.
Mar. 15	Filed order (FLETCHER) The stay of mandate is extended to 04-01-88. No further extensions will be granted by this court.
Apr. 8	Rec'd as of 4/7/88 notice from Supreme Court of filing of petition for writ of certiorari 3/31/88 (S.C. #87-1622).
June 27	FILED Certified copy of SC Order allowing certiorari (Filed in SC 6/20/88) the petition herein for a writ of certiorari to the United States Court of Appeals for the 9th Circuit is granted. The case is consolidated with SC # 87-1622 (CA# 85-4433) Phillip Brendale v. Confederated Bands and Tribe of Yakima Indian Nation, et. al. and SC# 87-1711 (CA # 85-4383), County of Yakima Indian Nation, and a total of one hour is allotted for oral argument.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Whiteside I)

*85-4433, Confederated Tribes and Bands of the Yakima Indian Nation, Plaintiff-Appelle vs. Jim Whiteside, Graham Tollefson, Charles Klarich, Richard Anderwald, Defendants, and Phillip Brendale, Defendánt-Appellant. DC No. C83-604JLQ; Notice of Appeal Filed December 19, 1985; Consolidated: 85-4316, 85-4383.

Date	Filings-Proceedings
1985	
Dec. 26	DOCKET NUMBER ASSIGNED. JS-34 PREPARED.
Mar. 14	Filed order in 85-4316, (CONFATT, SMJ) (1) These appeals are consolidated 85-4216, 85-4433, 85-4383.

FOR FURTHER PROCEEDINGS, SEE 85-4316

*Defendant Brendale field two Notices of Appeal in Whiteside I resulting in the assignment of two Ninth Circuit docket numbers, 85-4316 and 85-4433.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Whiteside II)

85-4383, Confederated Tribes And Bands of the Yakima Indian Nation, Plaintiff-Appellants, vs. County of Yakima, Jim Whiteside, Graham Tollefson, Charles Klarich, Richard F. Anderwald, Stanley Wilkinson, Jim Gatliff and Dick Keller, Defendants-Appellees. DC No. C83-724JLQ; Appeal filed November 29, 1985; Consolidated: 85-4316, 85-4433.

Date		Filings-Proceedings
1985		
Dec.	6	DOCKET NUMBER ASSIGNED. JS-34 PREPARED.
1986		
Mar.	14	Filed order in 85-4316, (CONFATT, SMJ) (1) These appeals are consolidated, 85-4316, 85-4433, 85-4383
Apr.	24	FILED CERT OF RECORD (4/4/86)

FOR FURTHER PROCEEDINGS, SEE 85-4316

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON

NO. C-83-604-JLQ

COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF AND DAMAGES
FILED SEPTEMBER 12, 1983

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Plaintiff,

v.

JIM WHITESIDE, GRAHAM TOLLEFSON,
CHARLES KLARICH, RICHARD ANDERWALD,
PHILIP BRENDALE and FRANK GLASPEY,
Defendants.

Plaintiff alleges as follows:

1. Nature of Proceedings:

1.1. Nature of the case. This is an action for declaratory and injunctive relief and for damages brought pursuant to 28 USC Sec. 2201, 28 USC Sec. 1362, and arises under 28 USC Sec. 2201, 42 USC Sec. 1983, 42 USC Sec. 1988, Treaty with the Yakimas, 12 Stat. 951, Enabling Act, 25 Stat. 676, and under Article 1, Section 8, Article 6, Section 2, and the Fourteenth Amendment of the United States Constitution, as is hereinafter more fully set forth.

1.2. Jurisdiction of this Court. This Court has jurisdiction of this cause pursuant to 28 USC Sec. 1362, because the plaintiff, Confederated Tribes and Bands of the Yakima Indian Nation (hereinafter called "Yakima Indian Nation"), is an Indian tribe or nation with a governing body recognized by the Secretary of Interior, and the matter in controversy arises under the Constitution, laws and treaties of the United States.

In addition, this Court has jurisdiction of this cause pursuant to 28 USC Sec. 1343 for the deprivation of the constitutional rights, privileges and immunities of plaintiff.

2. Parties:

2.1. The Yakima Indian Nation, plaintiff, is a sovereign Indian nation or tribe established by treaty with the United States of America (12 Stat. 951) with a governing body duly recognized by the Secretary of Interior of the United States. Said Yakima Nation, through its governing body, exercises certain treaty-reserved governmental powers within the exterior boundaries of the Yakima Indian Reservation (which are described in the Treaty with the Yakimas). These powers will be more particularly and appropriately described in this Complaint.

2.2 Defendants Jim Whiteside, Graham Tollefson and Charles Klarich, are residents of the County of Yakima, State of Washington, and are the county commissioners of the County of Yakima, State of Washington. Said County of Yakima is a municipal corporation or county of the State of Washington.

2.3 Defendant Richard Anderwald is a resident of the County of Yakima, State of Washington, and is the Director of the Planning Department, County of Yakima, State of Washington.

2.4 Philip Brendale and Frank Glaspey are residents of the County of Yakima, State of Washington.

3. Facts Relevant to Plaintiff's Request for Relief.

3.1. The Yakima Indian Reservation, described in the Treaty with the Yakimas, was explicitly reserved by the Treaty with the Yakimas "for the exclusive use of said confederated tribes and bands of Indians" now the Yakima Indian Nation. Said treaty likewise explicitly provides that no non-member, excepting those in the employment of the Indian Department, shall "be permitted to reside upon the said reservation without the permission of the tribe, the superintendent or agent".

3.2. The Enabling Act (25 Stat. 676) provides that the State of Washington shall have no jurisdiction over lands within the Yakima Indian Reservation.

3.3. The Yakima Indian Nation has, pursuant to its reserved governmental powers, through its governing body, adopted resolutions prohibiting entry by non-members without tribal permit into a portion of the Yakima Reservation and has adopted land use and zoning resolutions regulating land use within the Yakima Indian Reservation. Said land use regulations except incorporated cities and towns within the Yakima Indian Reservation, but regulate land use in all other parts of the reservation and the area of controversy described herein.

3.4. On April 29, 1983, defendants Philip Brendale and Frank Glaspey filed an application with the Yakima County Planning Department for a preliminary plat requesting approval by the defendant Yakima County Commissioners of a preliminary plat permitting the construction of cabins and residences on lands within Section 14, Township 8 North, Range 14, EWM.

3.5. Said parcel, title of which is held in a non-trust status, is within the "Closed Area" of the Yakima Indian Reservation where no entry is authorized without the permission of the Yakima Indian Nation and is within the "Reservation Restricted Area" where buildings or other permanent structures for private use are prohibited by land use regulations of the Yakima Indian Nation.

3.6. Defendants Philip Brendale and Frank Glaspey have refused to seek the permission of the Yakima Indian Nation to construct such buildings or structures or to obtain permission for entry to these buildings or structures when constructed. Defendant Philip Brendale, titleholder of the parcel, has announc-

ed by word and deed that he will not comply with the land use regulations of the Yakima Indian Nation.

3.7. All defendants have taken the position that Yakima County has exclusive land use regulatory power within non-trust and non-restricted lands within the Closed Area, Reservation Restricted Area, and indeed the entire Yakima Indian Reservation, without regard to the provisions of the Treaty with the Yakimas and land use and entry resolutions, ordinances and laws of the Yakima Indian Nation.

3.8. In addition to the governmental and regulatory powers of the Yakima Indian Nation, the Yakima Indian nation is the beneficial owner of treaty-reserved and otherwise acquired lands and resources within the Yakima Indian Reservation. The members of the Yakima Nation are likewise beneficial owners of lands and resources within the Yakima Indian Reservation.

In the Closed Area, in Yakima County, the land holdings are approximately as follows:

Owned by Yakima Nation:	636,000 acres;
Owned by Individual Indians:	79,000 acres;
Other:	25,000 acres.

3.9. In the Closed Area the Yakima Indian Nation has established a game preserve to assist the propagation of game animals which contributes greatly to the livelihood of the members of the Yakima Indian Nation and its culture. Likewise, the Closed Area and its restricted character, is important to the preservation of natural foods and medicines and the fulfillment of the cultural way of life of the Yakima Nation and its members.

3.10. The forest area, from which income is derived and which is the primary source of funding for governmental operations of the Yakima Indian Nation, is within said Closed Area. Increased usage increases fire danger to this important resource and increases the

cost to protect this important resource.

3.11. The regulation of land use within the exterior boundaries of the Yakima Indian Reservation is necessary to the political integrity of the Yakima Indian Reservation and the health, welfare and safety of the Yakima Indian Nation and its members and residents of the Yakima Indian Reservation.

3.12. On June 20, 1983, after acceptance of the power and jurisdiction of the County of Yakima to control land use of non-trust and non-restricted lands within the exterior boundaries of the Yakima Indian Reservation, defendant Richard Anderwald, Director of Yakima County Planning Department, under color of state law, determined that the preliminary plat and the change in land use of the premises involved herein would not have a significant adverse impact on the environment and issued a declaration of non-significance under the Washington State Environmental Policy Act (SEPA) regarding said proposed land use.

3.13. On June 22, 1983, within the three-day appeal period, the plaintiff filed a notice of appeal of this determination with Yakima County Commissioners alleging that Yakima County did not have jurisdiction or power to regulate or permit land use contrary to the usage permitted by the Yakima Indian Nation and in the alternative that the proposed land use would have significant adverse impact upon the environment and that an environmental impact statement (EIS) is required under Washington State Environmental Protection Act (SEPA). (RCW 43.21C.030(2).

3.14. During the hearing of this appeal on August 1, 2, 8 and 9, 1983, defendants Jim Whiteside, Graham Tollefson and Charles Klarich, held that under state law they had jurisdiction to determine and regulate land usage within the exterior boundaries of the Yakima Indian Reservation and that under state law and county ordinance they would not hear evidence or argument

contesting the exclusive power of the County of Yakima to regulate land use on non-trust or non-restricted lands within the exterior boundaries of the Yakima Indian Reservation. Under this ruling, defendants were foreclosed and prohibited from presenting evidence or further argument on the land use power of the Yakima Indian Nation to determine and regulate land use within said Yakima Indian Reservation. All of these determinations were made under color of state law by said defendants.

3.15. Said determinations deprived plaintiff of due process under the Fourteenth Amendment of the United States Constitution, were a violation of the Yakima Indian Nation's treaty rights, contrary to the Supremacy Clause of Article 6 of the United States Constitution and invaded the power and political integrity of the Yakima Indian Nation and the Congress of the United States embodied in the Commerce Clause of Article 1 of the United States Constitution, the Enabling Act, Treaty with the Yakimas and federal law.

3.16. After hearings on the appeal, the defendant County Commissioners determined that the proposed land use would have a significant adverse impact on the environment, reversed the declaration of non-significance, issued a declaration of significance and directed that an EIS be prepared as appears more fully from copies of said determinations issued August 16, 1983, attached hereto as Exhibit "A" and made a part hereof by reference.

3.17. Defendant County Commissioners, Jim Whiteside, Graham Tollefson and Charles Klarich, are continuing under color of state law to regulate and determine land use of the parcel herein involved and have merely continued this determination — without regard to Yakima Indian Nation permitted or prohibited land use on the Yakima Indian Reservation — until such time as the EIS is prepared. Defendants Philip Brendale, Frank Glaspey and Richard Anderwald, are joining with and acting in concert with said defendant Commissioners Jim Whiteside, Graham Tollefson and Charles Klarich, in such action and all defendants seek to impose this change of land use within the Yakima Indian Reservation without obtaining or applying for permission of the Yakima Indian Nation and contrary to the duly promulgated land use and entry regulations of the Yakima Indian Nation.

3.18. Defendants Philip Brendale and Frank Glaspey have informed the Yakima Indian Nation that they intend to sell portions of the parcel involved herein for building sites contrary to the land use and entry regulations of the Yakima Indian Nation and to use these premises in a manner contrary to the entry and land use regulations of the Yakima Indian Reservation. They are taking this action under color of state law.

3.19. These actions by all defendants are under color of state law including namely: Chapter 43.C, Chapter 36.70, Chapter 58.17 RCW, and county ordinances promulgated thereunder.

3.20. Said defendants individually and in concert have attempted and continue to impose county land use regulations and certain land use within the Yakima Indian Reservation contrary to the wishes of the Yakima Indian Reservation and land use and entry regulations promulgated by the Yakima Indian Reservation.

3.21. The Congress of the United States has never authorized the State of Washington, or any county thereof, power to permit and regulate land use on any lands within the Yakima Indian Reservation contrary to the land use and entry regulations of the Yakima Indian Nation and the power to regulate entry and land use within the Yakima Indian Reservation has been reserved exclusively to the Yakima Indian Nation by the Treaty with the Yakimas and by federal law.

3.22. All of the actions of the defendants are under color of state law, are unlawful and are in viola-

tion of the plaintiff's rights, privileges and immunities as guaranteed by the Constitution, laws and treaties of the United States, and by denying plaintiff's right to be heard on the power and jurisdiction question, defendants Jim Whiteside, Graham Tollefson and Charles Klarich, have denied plaintiff due process of law.

3.23. As a direct and proximate result of these concerted acts by defendants, and each of them, plaintiff has suffered actual, immediate and continuing harm. In defendants' assault against the political integrity, health, safety and welfare of the Yakima Indian Nation, they have caused these special damages:

3.23.1. Cost of preparing for and appearing at the County proceedings in a vain attempt to protect their reserved rights, privileges and immunities by establishing under Yakima County's lack of jurisdiction and power to permit and grant land use and entry contrary to the Treaty with the Yakimas and land use and entry regulations of the Yakima Indian Nation.

3.23.2. Cost of continuing to prepare for and appearing (attorney's fees and other costs) at administrative hearings regarding this proposed action by the defendants.

3.23.3. Extreme mental, emotional and psychological distress caused by these attempted intrusion tactics into the political integrity, health, welfare and safety of the Yakima Indian Nation and a closed area within its reservation reserved for its exclusive use and benefit by the Treaty with the Yakimas.

3.23.4. The cost of preparing for and trying this matter (attorney's fees and other costs) to obtain a declaratory judgment and other relief to protect the federally and constitutionally guaranteed rights, privileges and immunities of the Yakima Indian Nation.

The money equivalent of these damages is not as-

certainable at this time, because the damage to plaintiff continues. Said amounts will be furnished prior to trial and it is alleged that they exceed $100,000.00.

3.24. The damage and continuing damage to the plaintiff is irreparable and plaintiff has no adequate remedy at law. This unwarranted and illegal action by defendants strikes at the very heart of the political integrity of the Yakima Indian Nation and its welfare, health and safety. Until resolved, the basic issue is a continuing effect on the political integrity of the Yakima Indian Nation, its health, welfare and safety, and the enjoyment of treaty-reserved and contitutionally-guaranteed rights, immunities and privileges. Until resolved, it will impede the general welfare and the exercise of the governmental function of the Yakima Indian Nation. Speedy granting of restraints against defendants is in order.

4. Relief Requested.

4.1. Wherefore, plaintiff prays that this Court:

4.1.1. Issue a temporary restaining order on this complaint, record and roll, restraining defendants from permitting, or to take any action towards permitting, land use contrary to the land use and entry regulations of the Yakima Indian Nation on the parcel involved.

4.1.2. Enjoin, both preliminary to suit and permanently, defendants, their agents, employees, successors or persons in active concert in participation with them, from any action or permitting any action on the parcel involved contrary to the land use and entry regulations of the Yakima Indian Nation.

4.1.3. Issue a declaratory judgment declaring the rights of the parties regarding land use and entry regulations within the exterior boundaries of the

Yakima Indian Reservation.

4.1.4. Grant plaintiff a judgment against all defendants and each of them for the specific damages outlined in 3.22 above.

4.1.5. Grant plaintiff a judgment against all defendants and each of them for reasonable attorney's fees and costs in the prosecution of this action under 42 USC Sec. 1988 and otherwise.

4.1.6. Award such further relief as this Court deems proper.

DATED this 7th day of September, 1983.

/s/ _____
JAMES B. HOVIS
Hovis, Cockrill, Weaver & Bjur
Attorneys for Confederated Tribes and Bands of the Yakima Indian Nation, Plaintiff

(Jurat omitted in printing.)

JOHNSON MENINICK, being first sworn, deposes and says:

1. I am the Chairman of the Yakima Tribal Council.

2. I am authorized to verify this Complaint for Declaratory and Injunctive Relief and Damages in the captioned matter on behalf of the Yakima Indian Nation.

3. I have read the foregoing Complaint and I know its contents. To the best of my knowledge and belief, all of the statements in the said Complaint are true and correct.

/s/ _____
JOHNSON MENINICK

(Exhibit omitted in printing)

NO. C-83-604-JLQ

SECOND SUPPLEMENTED AFFIDAVIT OF DEFENDANT-BRENDALE IN SUPPORT OF HIS MOTION FOR RECONSIDERATION

Filed September 19, 1985
(Jurat and title omitted in printing.)

PHILIP BRENDALE, on oath, states:

I am one of the Defendants herein, over the legal age, competent to testify herein, and submit this "Second Supplemental Affidavit" based on my personal knowledge of the facts in this case.

Exhibit "A-1" attached and incorporated herein consists of 23 photographs of cabins and associated outbuildings, all permanent structures, located in the "closed area" of the Yakima Indian Reservation. The pictures were taken between 4/25/84 and 6/30/84 except the photograph of the "Lynch cabin", "Site 13" which was taken in November, 1983. The location of these permanent structures within the "closed area" is shown on the map which is attached and incorporated herein as Exhibit "A-2".

The cabin and barn located at site 7 are on deeded land and owned by Jack Davenport who is not an enrolled Yakima. It is my understanding Mr. Davenport acquired the property in 1979, has access to the property through the Kaiser Butte Guard Station by virtue of a "Tribal Police Commission". Because Mr. Davenport acquired his property after the 1972 BIA closure notice, he is, pursuant to the terms of the notice, not entitled to an entry permit.

It is also my understanding the owner of cabin la at site 12 sells groceries for cash or trades groceries for huckleberries during the huckleberry season. From my visual inspection of the campground located at site 12, there also appears to be one and possibly two "snack bars" operated at the site.

These commercial activities conducted from permanent structures in the closed area are inconsistent with the Court's finding the area is reserved for cultural and religious activities by tribal members.

Exhibit "B" attached and incorporated herein is the map of a 50-lot subdivision located within the closed area and Yakima County between Satus Creek and Highway 97 in Section 21, Township 18 North, Range 7, E.W.M. The subdivision was created in the late 1960's and one cabin was constructed in the subdivision prior to 1972. After adoption of the 1972 amended zoning regulations, the cabin was destroyed by fire and rebuilt. In addition, at least five (5) mobile homes have been placed on lots in the subdivision since enactment of the amended zoning ordinance. The rebuilding of the cabin and the placement of mobile homes on lots within the subdivision were apparently accomplished without objection from the Tribe even though the cabin and mobile homes are clearly permanent structures which are purportedly prohibited in the closed area.

/s/ _____
PHILIP BRENDALE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

NO. C-83-724-JLQ

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

FILED OCTOBER 28, 1983

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Plaintiff,

v.

COUNTY OF YAKIMA, JIM WHITESIDE, GRAHAM TOLLEFSON, CHARLES KLARICH, RICHARD F. ANDERWALD, STANLEY WILKINSON, JIM GATLIFF, and DICK KELLER,
Defendants,

FIRST COUNT

Plaintiff complains against defendants Jim Whiteside, Graham Tollefson, Charles Klarich, Richard F. Anderwald, Stanley Wilkinson, Jim Gatliff and Dick Keller for a first count as follows:

1. Nature of Proceedings:

1.1. Nature of the case. This is an action for declaratory and injunctive relief and for damages brought pursuant to 28 USC Sec. 2201, 28 USC Sec. 1362, and arises under 28 USC Sec. 2201, 42 USC Sec. 1983, 42 USC Sec. 1988, Treaty with the Yakimas, 12 Stat. 951, Enabling Act, 25 Stat. 676, and under Article 1, Section 8, Article 6, Section 2, and the Fourteenth Amendment of the United State Consitutuion, as is hereinafter more fully set forth; and to obtain a determination that an Environmental Impact Statement (EIS) is required under Chapter 43.21C RCW, and enjoin any change in land use until prepared.

1.2. Jurisdiction of this Court. This Court has jurisdiction of this cause pursuant to 28 USC Sec. 1362, because the plaintiff, Confederated Tribes and Bands of the Yakima Indian Nation (hereinafter called "Yakima Indian Nation"), is an Indian tribe or nation with a governing body recognized by the Secretary of Interior, and the matter in controversy arises under the Constitution, laws and treaties of the United States.

Likewise, this Court has jurisdiction of this cause pursuant to 28 USC Sec. 1343 for the deprivation of the constitutional rights, privileges and immunities of plaintiff.

1.3. Pendent jurisdiction of this Court. The action for a determination that preparation of an Environmental Impact Statement (EIS) is required under 43.21C RCW, which is alleged in count two of this complaint and the action for the federal claim, which is alleged in count one of this complaint, are based on the same operative facts, as hereinafter more clearly appears.

Both count one and the federal claim already before this Court in C-83-604-JLQ have as a primary base a determination of a basic federal treaty question requiring a determination by the federal courts.

Judicial economy, convenience and fairness to the parties herein will result if the Court assumes and exercises jurisdiction of the action for determination that an EIS is required which is alleged in count two of this complaint. Likewise, Article III of the Constitution of the United States would require that this matter be determined by a judge having life tenure.

2. Parties:

2.1. The Yakima Indian Nation, plaintiff, is a sovereign Indian nation or tribe established by treaty with the United States of America (12 Stat. 951) with a governing body duly recognized by the Secretary of Interior of the United States. Said Yakima Indian Nation, through its governing body, exercises certain treaty-reserved governmental powers within the exterior bound-

aries of the Yakima Indian Reservation (which are described in the Treaty with the Yakimas). These powers will be more particularly and appropriately described in this complaint.

2.2. Defendant Yakima County is a municipal corporation or county of the State of Washington.

2.3. Defendants Jim Whiteside, Graham Tollefson and Charles Klarich, are residents of the County of Yakima, State of Washington, and commissioners of Yakima County.

2.4. Defendant Richard Anderwald is a resident of the County of Yakima, State of Washington, and is the Director of the Planning Department, County of Yakima, State of Washington.

2.5. Defendants Stanley Wilkinson, Jim Gatliff and Dick Keller, are residents of the County of Yakima, State of Washington.

3. Facts Relevant to Plaintiff's Request for Relief.

3.1. The Yakima Indian Reservation, described in the Treaty with the Yakimas, was explicitly reserved by the Treaty with the Yakimas "for the exclusive use of said confederated tribes and bands of Indians" now the Yakima Indian Nation. Said treaty likewise explicitly provides that no non-member, excepting those in the employment of the Indian Department, shall "be permitted to reside upon the said reservation without the permission of the tribe, the superintendent or agent".

3.2. The Enabling Act (25 Stat. 676) provides that the State of Washington shall have no jurisdiction over lands within the Yakima Indian Reservation.

3.3. The Yakima Indian Nation has, pursuant to its reserved governmental powers, through its governing body, adopted land-use and zoning regulations regulating land use within the Yakima Indian Reservation. Said land-use regulations except incorporated cities and towns within the Yakima Indian Reservation, but regulate land use in all other parts of the reservation

and the area of controversy described herein.

3.4. On August 24, 1983, defendant Stanley Wilkinson filed an application with the Yakima County Planning Department to subdivide approximately 32 acres into 20 lots, permitting the construction of residences on lands within Section 10, Township 12 North, Range 18, EWM. The size of the lots range from 1.12 acres to 4.5 acres.

3.5. Said parcel, title of which is held in a non-trust status, is within the Yakima Indian Reservation and an area where buildings or other permanent structures for private use on less than five acres are prohibited by land-use regulations of the Yakima Indian Nation.

3.6. Defendant Stanley Wilkinson has not sought the permission of the Yakima Indian Nation to construct such buildings or structures on lots containing area less than five acres.

3.7. All defendants have taken the position that Yakima County has exclusive land-use regulatory power within non-trust and non-restricted lands within the entire Yakima Indian Reservation, without regard to the provisions of the Treaty with the Yakimas and land-use and entry resolutions, ordinances and laws of the Yakima Indian Nation.

3.8. In addition to the governmental and regulatory powers of the Yakima Indian Nation, the Yakima Indian Nation is the beneficial owner of treaty-reserved and otherwise acquired lands and resources within the Yakima Indian Reservation. The members of the Yakima Indian Nation are likewise beneficial owners of lands and resources within the Yakima Indian Reservation.

3.9. The regulation of land use within the exterior boundaries of the Yakima Indian Reservation is necessary to the political integrity of the Yakima Indian Reservation and the health, welfare and safety of the Yakima Indian Nation and its members and residents of

the Yakima Indian Reservation.

3.10. On September 30, 1983, Richard F. Anderwald, as Director of Planning of the County of Yakima, issued a determination that the Wilkinson proposal would have a significant adverse impact on the environment.

3.11. On October 11, 1983, after acceptance of the power and jurisdiction of the County of Yakima to control land use of non-trust and non-restricted lands within the exterior boundaries of the Yakima Indian Reservation, defendant Richard F. Anderwald as Director of Yakima County Planning Department, under color of state law determined that the change in land use of the premises involved herein would not have a significant adverse impact on the environment and issued a declaration of non-significance under the Washington State Environmental Policy Act (SEPA) regarding said proposed land use.

3.12. On October 14, 1983, the plaintiff filed a notice of appeal of this determination with the Yakima County Commissioners alleging that Yakima County did not have jurisdiction or power to regulate or permit land use contrary to the usage permitted by the Yakima Indian Nation and in the alternative that the proposed land use would have significant adverse impact upon the enviornment and that an EIS is required under SEPA. (RCW 43.21C.030(2).)

3.13. During the hearing of this appeal on October 25, 1983, defendants Jim Whiteside, Graham Tollefson and Charles Klarich, held that under state law they had jurisdiction to determine and regulate land usage within the exterior boundaries of the Yakima Indian Reservation and that under state law and county ordinance they would not hear evidence or argument contesting the exclusive power of the County of Yakima to regulate land use on non-trust or non-restricted lands within the exterior boundaries of the Yakima Indian Reservation. Under this ruling, defendants were foreclosed

and prohibited from presenting evidence or further argument on the land-use power of the Yakima Indian Nation to determine and regulate land use within said Yakima Indian Reservation. Likewise, they determined that rules of practice or procedure do not need to be established to guide determination of said appeal. All of these determinations were made under color of state law by said defendants.

3.14. Said determinations deprived plaintiff of due process under the Fourteenth Amendment of the United States Constitution, were a violation of the Yakima Indian Nation's treaty rights, contrary to the Supremacy Clause of Article 6 of the United States Constitution and invaded the power and political integrity of the Yakima Indian Nation and the Congress of the United States embodied in the Commerce Clause of Article 1 of the United States Constitution, the Enabling Act, Treaty with the Yakimas and federal law.

3.15. After hearing on the appeal, the defendant County Commissioners determined that the proposed land use would not have a significant adverse impact on the environment.

3.16. Defendant County Commissioners Jim Whiteside, Graham Tollefson and Charles Klarich, are continuing under color of state law to regulate and determine land use of the parcel herein involved without regard to Yakima Indian Nation permitted or prohibited land use on the Yakima Indian Reservation. Defendant Stanley Wilkinson is joining with and acting in concert with said defendant Commissioners Jim Whiteside, Graham Tollefson and Charles Klarich, in such action and all defendant seek to impose this change of land use within the Yakima Indian Reservation without obtaining or applying for permission of the Yakima Indian Nation and contrary to the duly promulgated land use and entry regulations of the Yakima Indian Nation.

3.17. Defendant Stanley Wilkinson intends to transfer the parcel involved herein for building sites contrary to the land-use and entry regulations of the Yakima Indian Nation and to use these premises in a manner contrary to the entry and land-use regulations of the Yakima Indian Reservation. The transfer will be made to defendants Jim Gatliff and Dick Keller who will be selling said lots for residential purposes. They are taking this action under color of state law.

3.18. These actions by all defendants are under color of state law and county ordinances promulgated thereunder.

3.19. Said defendants individually and in concert have attempted and continue to impose county land-use regulations and certain land use within the Yakima Indian Reservation contrary to the wishes of the Yakima Indian Nation and land-use and entry regulations promulgated by the Yakima Indian Nation.

3.20. The Congress of the United States has never authorized the State of Washington, or any county thereof, power to permit and regulate land use on any lands within the Yakima Indian Reservation contrary to the land-use and entry regulations of the Yakima Indian Nation and the power to regulate entry and land-use within the Yakima Indian Reservation has been reserved exclusively to the Yakima Indian Nation by the Treaty with the Yakimas and by federal law.

3.21. All of the actions of the defendants are under color of state law, are unlawful and are in violation of the plaintiff's rights, privileges and immunities as guaranteed by the Constitution, laws and treaties of the United States, and by denying plaintiff's right to be heard on the power and jurisdiction question, defendants Jim Whiteside, Graham Tollefson and Charles Klarich have denied plaintiff due process of law.

3.22. As a direct and proximate result of these concerted acts by defendants, and each of them, plaintiff has suffered actual, immediate and continuing

harm. In defendants' assault against the political integrity, health, safety and welfare of the Yakima Indian Nation, they have caused these special damages:

3.22.1. Cost of preparing for and appearing at the County proceedings in a vain attempt to protect their reserved rights, privileges and immunities by establishing under Yakima County's lack of jurisdiction and power to permit and grant land use and entry contrary to the Treaty with the Yakimas and land-use and entry regulations of the Yakima Indian Nation.

3.22.2. Cost of continuing to prepare for and appearing (attorney's fees and other costs) at administrative hearings regarding this proposed action by the defendants.

3.22.3. Extreme mental, emotional and psychological distress caused by these attempted intrusion tactics into the political integrity, health, welfare and safety of the Yakima Indian Nation.

3.22.4. The cost of preparing for and tying this matter (attorney's fees and other costs) to obtain a declaratory judgment and other relief to protect the federally and constitutionally guaranteed rights, privileges and immunities of the Yakima Indian Nation.

The money equivalent of these damages is not ascertainable at this time, because the damage to plaintiff continues. Said amounts will be furnished prior to trial and it is alleged that they exceed $10,000.00.

3.23. The damage and continuing damage to the plaintiff is irreparable and plaintiff has no adequate remedy at law. This unwarranted and illegal action by defendants strikes at the very heart of the political integrity of the Yakima Indian Nation and its welfare, health and safety. Until resolved, the basic issue is a continuing one throughout the entire Yakima Indian Reservation that exceeds the principal case and has a continuing effect on the political integrity of the

Yakima Indian Nation, its health, welfare and safety, and the enjoyment of treaty-reserved and constitutionally-guranteed rights, immunities and privileges. Until resolved, it will impede the general welfare and the exercise of the governmental function of the Yakima Indian Nation. Speedy granting of restraints against defendants is in order.

SECOND COUNT

Plaintiff complains against Yakima County, Jim Whiteside, Graham Tollefson, Charles Klarich, Richard F. Anderwald, Stanley Wilkinson, Jim Gatliff and Dick Keller, and for a second claim for relief alleges:

4.1. Plaintiff incorporates paragraphs 1, 1.1, 1.3, and 2 through 3.23 of its first count against defendants and makes such paragraphs a part hereof.

4.2. The proposed project is major action that will have a significant adverse environmental impact on the area of proposed development. Under the laws of the State of Washington and particularly Chapter 43.21C RCW, an Environmental Impact Statement (EIS) is required to be prepared. No such EIS is being prepared.

4.3. Construction has not yet begun on the proposed project. The preparation of an EIS can therefore still avoid or minimize the adverse environmental impact of such project on the affected area.

4.4 Defendants have not given actual consideration of the environmental impact of the proposed action as required by state law in making their determination that no substantial environmental impact would result. Lassila v. Wenatchee, 89 Wn.2d 804, 814, 576 P.2d 54 (1979).

4.5. Defendant Yakima County has not promulgated rules of practice and procedure regarding appeals of administrative determination as required by Chapter 41.23C RCW and regulations promulgated thereunder.

4.6 Defendants have not complied with the mandatory requirement to consult with the Yakima Indian Nation before making environmental determinations under Chapter 43.21C as required by state law. SAVE v. Bothell, 89 Wn.2d 862, 576 P.2d 401 (1978); RCW 43.21C.030; WAC 197-10-040(7), (23).

4.7. If defendants are permitted to proceed with the project without complying with the provisions of Chapter 43.21C RCW, plaintiff will suffer great and irreparable injury for which plaintiff has no adequate remedy at law.

5. Relief Requested.

5.1. Wherefore, on plaintiff's first claim against defendants Jim Whiteside, Graham Tollefson, Charles Klarich, Richard F. Anderwald, Stanley Wilkinson, Jim Gatliff and Dick Keller, plaintiff prays that this Court

5.1.1. Issue a temporary restraining order on this complaint, record and roll, restraining defendants from permitting, or to take any action toward permitting, land use contrary to the land-use and entry regulations of the Yakima Indian Nation on the parcel involved;

5.1.2. Enjoin, both preliminary to suit and permanently, these defendants, their agents, employees, successors or persons in active concert in participation with them, from any action or permitting any action on the parcel involved contrary to the land-use and entry regulations of the Yakima Indian Nation;

5.1.3. Issue a declaratory judgment declaring the rights of the parties regarding land-use and entry regulations within the exterior boundaries of the Yakima Indian Reservation;

5.1.4. Grant plaintiff a judgment against all these defendants and each of them for the specific damages outlined in 3.22 above;

5.1.5. Grant plaintiff a judgment against all these defendants and each of them for reasonable attorney's fees and costs in the prosecution of this action under 42 USC Sec. 1988 and otherwise;

5.1.6 Award such further relief as this Court deems proper.

5.2. Wherefore, on plaintiff's second claim against defendants Yakima County, Jim Whiteside, Graham Tollefson, Charles Klarich, Richard F. Anderwald, Stanley Wilkinson, Jim Gatliff and Dick Keller, plaintiff prays as follows:

5.2.1. Issue a temporary restraining order on this complaint, record and roll, restraining defendants from permitting, or to take any action towards permitting contemplated land use without the preparation of an EIS;

5.2.2. Enjoin, both preliminary to suit and permanently, defendants, their agents, employees, successors or persons in active concert in participation with them, from any action or permitting any action on the parcel involved, before the preparation of and EIS;

5.2.3. Issue a declaratory judgment declaring the rights of the parties regarding Chapter 43.21C RCW;

5.2.4. Award such further relief as this Court deems proper.

DATED this 27th day of October, 1983.

/s/_____
JAMES B. HOVIS
Hovis, Cockrill, Weaver & Bjur
Attorneys for the Confederated
Tribes and Bands of the Yakima
Indian Nation, Plaintiff

(Jurat omitted in printing)

JOHNSON MENINICK, being first sworn, deposes and says:

1. I am the Chairman of the Yakima Tribal Council.

2. I am authorized to verify this Complaint for Declaratory and Injunctive Relief and Damages in the captioned matter on behalf of the Yakima Indian Nation.

3. I have read the foregoing Complaint and I know its contents. To the best of my knowledge and belief, all of the statements in the said Complaint are true and correct.

/s/_____
JOHNSON MENINICK

AMENDED ZONING REGULATIONS OF THE YAKIMA INDIAN NATION

* * * *

RESOLUTION T-98-72

WHEREAS, by the 'Treaty with the Yakimas', (12 Stat. 951) the Yakima Indian Reservation was set aside for the use of the Yakima Indian Nation, and covenanted that "no white man shall be permitted to reside thereon without permission of the tribe and of the Superintendent of Indian Affairs or Indian Agent"; and

WHEREAS, implicit in that treaty is the sovereign power to regulate the use of lands within the exterior boundaries of the reservation in a proper zoning and planning scheme; and

WHEREAS, the Attorney General of the United States, 23 OP.A.G. 214, has ruled that

> "the legal right to purchase land within an Indian nation gives to the purchasers no right of exemption from the law of such nation . . . these nations (are fully authorized) to absolutely exclude outsiders, or to permit their residence or business upon such terms as they may choose to impose . . . "

and

WHEREAS, the Solicitor of the United States Department of the Interior, 55I.D. 14, has ruled that

> "over all the land of the reservation, whether owned by the tribe, by members thereof, or by outsiders the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business . . . "

which principle has been sustained by the Supreme Court of the United States, see 'Morris v. Hitchcock,' 194 U.S. 384, and other courts; and

WHEREAS, it is necessary to zone and plan regarding both trust and non-trust properties on the reservation; and

WHEREAS, pending further extensive planning it is necessary to provide a basic zoning ordinance which will coordinate with other zoning authorities; and

WHEREAS, due to the increasing complexity of land use within the exterior boundaries of the Yakima Reservation, it is necessary to amend tribal zoning ordinance T-16-71; and

NOW, THEREFORE, BE IT RESOLVED by the Yakima Tribal Council meeting in special session at the Yakima Indian Agency; Toppenish, Washington; a quorum being present, as follows:

SECTION 1. TITLE

This ordinance shall be known as the AMENDED ZONING ORDINANCE of the Yakima Indian Nation.

SECTION 2. PURPOSE

The controls as set forth in this ordinance are deemed necessary in order to encourage the most appropriate use of the land; to protect the social and economic stability of residential, agriculture, commercial, industrial, forest, reserved and other areas within the reservation, and to assure the orderly development of such areas; and; to obviate the menace to the public safety resulting from the improper location of buildings and the uses thereof, and the establishment of land uses along primary highways in such a manner as to cause interference with existing and proposed traffic movement on said highways; and to otherwise promote the public health, safety, morals and general welfare in accordance with the rights reserved by the Yakima Indian Nation in the 'Treaty with the Yakimas' (12 Stat. 951).

SECTION 3. ESTABLISHMENT OF DISTRICTS: PROVISION FOR OFFICIAL ZONING MAP

1. Official Zoning Map: the Yakima Indian Reservation is hereby divided into zones or use districts, as shown in the Official Zoning Map which, together with all explanatory matter thereon, is hereby adopted by reference and declared to be a part of this ordinance.

The Official Zoning Map comprised of several sections shall be identified by the signature of the Chairman of the Tribal Council, together with the date of the adoption of this ordinance.

If in accordance with the provisions of this ordinance, changes are made in district boundaries or other matter portrayed on the Official Zoning Map, such changes shall be made on the Official Zoning Map promptly after the amendment has been approved by the Tribal Council. The amending ordinance shall provide that such changes and amendments shall not become effective until they have been duly entered upon the Official Zoning Map. No amendment to this ordinance which involves matter portrayed on the Official Zoning Map shall become effective until after such changes and entry has been made on such map.

No changes of any nature shall be made in the Official Zoning Map or matter shown thereon except in conformity with the procedures set forth in this Ordinance. Any unauthorized change of whatever kind by any person or persons shall be considered a violation of this Ordinance and punishable as provided by applicable law.

Regardless of the existence of purported copies of the Official Zoning Map which may from time to time be made or published the Official Zoning Map which shall be located in the office of the Tribal Chairman, (with a certified copy located in the Planning Office) shall be the final authority as to the current zoning status of land in the Yakima Reservation.

2. Replacement of the Official Zoning Map: In the event that the Official Zoning Map becomes damaged, destroyed, lost, or difficult to interpret because of the nature or number of changes and additions, the Tribal Council may by resolution adopt a new Official Zoning map which shall supersede the prior Official Zoning Map. The new Official Zoning Map may correct drafting or other errors or omissions in the prior Official

Zoning Map, but no such correction shall have the effect of amending the original zoning ordinance or any subsequent amendment thereof.

SECTION 4. INTERPRETATION OF DISTRICT BOUNDARIES

Where uncertainty exists as to the boundaries of districts as shown on the Official Zoning Map, the following rules shall apply:

1. Boundaries indicated as approximately following the center lines of streets, highways, or alleys shall be construed to follow such center lines;

2. Boundaries indicated as approximately following platted lot lines shall be construed as following such lot lines;

3. Boundaries indicated as approximately following city limits shall be construed as following city limits;

4. Boundaries indicated as following railroad lines shall be construed to be midway between the main tracks;

5. Boundaries indicated as following shore lines shall be construed to follow such shore lines, and in the event of change in the shore line shall be construed as moving with the actual shore line; boundaries indicated as approximately following center lines of streams, rivers, canals, lakes or other bodies of water shall be construed in follow such center lines;

6. Boundaries indicated as parallel to or extensions of features indicated in subsections 1 through 5 shall be so construed. Distances not specifically indicated on the Official Zoning Map shall be determined by the scale of the map;

7. Where physical or cultural feature existing on the ground are at variance with those shown on the Official Zoning Map, or in other circumstances not covered by subsections 1 through 6, the Board of Adjustment shall interpret the district boundaries.

SECTION 5. NON-CONFORMING LOTS, NON-CONFORMING USES OF LAND, NON-CONFORMING STRUCTURES, AND NON-CONFORMING USES OF STRUCTURES AND LAND

1. Intent: Within the districts established by this ordinance or amendments that may later be adopted there exist lots, structures, and uses of land and structures which were lawful before this ordinance was passed or amended, but which would be prohibited, regulated, or restricted under the terms of this ordinance or future amendment.

It is the intent of this ordinance to permit these non-conformities to continue until they are removed, but not to encourage their survival. Such uses are declared by this ordinance to be imcompatible with permitted uses in the districts involved. It is further the intent of this ordinance that non-conformities shall not be enlarged upon, expanded or extended, nor be used as grounds for adding other structures or uses prohibited elsewhere in the same district.

A non-conforming structure, a non-conforming use of land, or an non-conforming use of a structure and land shall not be extended or enlarged after passage of this ordinance by attachment on a building a premises or additional signs intended to be seen from off the premises, or by the addition of other uses of a nature which would be prohibited generally in the district involved.

To avoid undue hardship, nothing in this ordinance shall be deemed to require a change in the plans, construction, or designated use of any building on which actual construction was lawfully begun prior to the effective date of adoption or amendment of this ordinance and upon which actual building construction has been diligently carried on. Actual construction materials in permanent position and fastened in a permanent manner except that where demolition or removal of an existing building has been substantially

begun preparatory to rebuilding, such demolition or removal shall be diligently carried on until completion of the building involved.

2. Non-Conforming Lots of Record: In any district in which single family dwellings are permitted, not-withstanding limitations imposed by other provisions of this ordinance, a single family dwelling and customary accessory buildings may be erected on any single lot of record at the effective date of adoption or amendment of this ordinance. Such lot must be in separate ownership and not of continuous frontage with other lots in the same ownership. This provision shall apply even though such lots fail to meet the requirements for area or width, or both, that are generally applicable in the district, provided that yard dimensions and other requirements not involving area or width, or both, of the lot shall conform to the regulations for the district in which such lot is located. Variance of area, width, and yard requirements shall be obtained only through action of the Board of Adjustment.

If two or more lots or combinations of lots and portions of lots with continuous frontage are in single ownership or record at the time of passage or amendment of this ordinance, and if all or part of the lots do not meet the requirements for lot width and area established by this ordinance, the lands involved shall be considered to be an undivided parcel for the purposes of this ordinance, and not portion of said parcel shall be used or sold which does not meet lot width and area requirements established by this ordinance, nor shall any division of the parcel be made which leaves remaining any lot with width or area below the requirements stated in this ordinance.

3. Non-Conforming Uses of Land: Where, at the effective date of adoption or amendment of this ordinance, lawful use of land exists that is made no longer permissible under the terms of this ordinance as enacted or amended, such use may be continued, so long as it re-

mains otherwise lawful, subject to the following provisions:

a) No such non-conforming use shall be enlarged or increased, nor extended to occupy a greater area land than was occupied at the effective date of adoption or amendment of this ordinance;

b) No such non-conforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of adoption or amendment of this ordinance;

c) If any such non-conforming use of land ceases for any reason for a period of more than 30 days, any subsequent use of such land shall conform to the regulations specified by this ordinance for the district in which such land is located.

4. Non-Conforming Structure: Where a lawful structure exists at the effective date of adoption or amendment of this ordinance that could not be built under the terms of this ordinance by reason or restrictions on area, lot coverage, height, yards, or other characteristics of the structure or its location on the lot, such structure may be continued so long as it remains otherwise lawful, subject to the following provisions:

a) No such structure may be enlarged or altered in a way which increases its non-conformity;

b) Should such structure be destroyed by any means to an extend of more than 50 percent of its replacement cost at time of destruction, it shall not be reconstructed except in conformity with the provisions of this ordinance;

c) Should such structure be moved for any reason for any distance whatever, it shall thereafter conform to the regulations for the district in which it is located after it is moved.

5. Non-Conforming Uses of Structure and Land: If a lawful structure and land in combination, exists at the

effective date of adoption or amendment of his ordinance, that would not be allowed in the district under the terms of this ordinance, the lawful use may be continued so long as it remains otherwise, subject to the following provisions:

a) No existing structure devoted to a use not permitted by this ordinance in the district in which it is located shall be enlarged, extended, constructed, reconstructed, moved, or structurally altered in any way except in changing the use of the structure to a use permitted in the district in which it is located.

b) Any non-conforming use may be extended throughout any parts of a building which were manifestly arranged or designed for such use at the time of adoption or amendment of this ordinance, but no such use shall be extended to occupy and land outside of such building;

c) If no structural alterations are made, any non-conforming use of a structure and land may be changed to another non-conforming use provided that the Board of Adjustment, either by general rule or by making findings in the specific case, shall find that the proposed use is equally appropriate to the district than the existing non-conforming use. In permitting such change, the Board of Adjustment may require appropriate conditions and safeguards in accord with the provisions of this ordinance;

d) Any structure, or structure and land in combination, in or on which a non-conforming use is superseded by a permitted use, shall thereafter conform to the regulations for the district in which such structure is located, and the non-conforming use may not thereafter be resumed;

e) When a non-conforming use of a structure, or

structure and land in combination, is discontinued or abandoned for twelve (12) consecutive months, the structure, or structure and land in combination shall not thereafter be used except in conformance with the regulations of the district in which it is located;

f) Where non-conforming use status applies to the structure and land in combination, removal or destruction of the structure shall eliminate the non-conforming status of the land which shall not thereafter be used except in conformance with the regulations of the district in which it is located.

6. Repairs and Maintenance: On any building devoted in whole or in part to any non-conforming use, work may be done in any period of twelve (12) consecutive months on ordinary repairs, or on repair or replacement of non-bearing walls, fixtures, wiring or plumbing, to an extent not exceeding ten (10) percent of the current replacement value of the building, provided that the cubic content of the building as it existed at the time of passage or amendment of this ordinance shall not be increased.

Nothing in this ordinance shall be deemed to prevent the strengthening or restoring to a safe condition of any building or part thereof declared to be unsafe by any official charged with protecting the public safety, upon order to such official.

7. Uses Under Special Exception Provisions Not Non-Conforming Uses: Any use for which a conditional use permit or a special property use permit is issued, as provided in this ordinance, shall not be deemed a non-conforming use in such district.

SECTION 6. SUPPLEMENTARY USE DISTRICT REGULATIONS

1. Vision Clearance at Intersections: All corner lots at intersections or railroads shall maintain for safety vi-

sion purposes a triangular area, one angle of which shall be formed by the lot lines adjacent to the street or railroad right-of-way. The sides of such triangle forming the corner angle shall be thirty (30) feet in length measured along the sides of the aforementioned angle. The third side of said triangle shall be a straight line connecting the last two mentioned points. Within the area comprising said triangle nothing shall be erected, placed, planted, or allowed to grow in such a manner as to a materially impede vision between the heights of two and one half (2½) and ten (10) feet above the center line grades of intersecting streets and/or railroads.

2. Swimming Pools: In all districts a three (3) foot setback from the side and rear property lines shall be maintained and the area around the pool shall be enclosed by a protective fence not less than four (4) feet in height.

SECTION 7. ADMINISTRATION AND ENFORCEMENT — BUILDING PERMITS AND CERTIFICATES OF ZONING COMPLIANCE

1. Administration and Enforcement: The Building Official and/or the Planning Director or their duly authorized agents, as administrative official, shall administer and enforce this ordinance. If the administrative official shall find that any of the provisions of this ordinance are being violated, he shall notify in writing the person responsible for such violations, indicating the nature of the violation and ordering the action necessary to correct it. He shall order discontinuance of any illegal work being done; or shall take any other action authorized by this ordinance to insure compliance with or to prevent violation of its provisions.

2. Building Permits Required: No building shall be erected, moved, added to, or structurally altered without a permit therefor, issued by the administrative official. No building permit shall be issued except in con-

formity with the provisions of this ordinance, except after written order from the Board of Adjustment.

3. Application for Building Permit: All applications for building permits shall be in writing on the form to be supplied by the Planning Department. The application shall include the legal description of the land, actual dimensions and shape of the lot be built upon, the exact size and locations on the lot of buildings already existing if any; and the location and dimensions of the proposed building or alteration. The application shall include such other information as lawfully may be required by the administrative official, including existing or proposed building or alteration; existing or proposed uses of the building and land; the number of families, housekeeping units, or rental units the building is designed to accommodate, conditions existing on the lot including but not limited to a soil log and a percolation test results, and such other matters as may be necessary to determine conformance with, and provide for the enforcement of this ordinance.

4. Expiration of Building Permit: If the work described in any building permit has not begun within 90 days from the date of issuance thereof, said permit shall expire; it shall be cancelled by the administrative official, and written notice thereof shall be given to the persons affected.

If the work described in any building permit has not been substantially conpleted within two years of the date of issuance thereof, said permit shall expire and be cancelled by the administrative official, and written notice thereof, shall be given to the persons affected, together with notice that further work as described in the cancelled permit shall not proceed unless and until a new building permit has been obtained.

5. Construction and Use to be Provided in Application, Plans and Permits: Building permits issued on the basis of plans and applications approved by the administrative official authorize only the applications, and no other use, arrangement, or construction. Use, arrangement, or construction at variance with that authorized shall be deemed a violation of this ordinance, and punishable as provided by Section 16 hereof.

SECTION 8. BOARD OF ADJUSTMENT

1. The Yakima Tribal Council is hereby designated as the Board of Adjustment.

2. Organization: When issues over which the Board has jurisdiction are pending upon it calendar, a meeting shall be called within thirty (30) days. All meetings shall be open to the public.

The Board of Adjustment shall adopt rules for the transaction of its business and shall keep a public record of its transactions, findings and determinations.

3. Hearings and Appeals Notices: Appeals to the Board of Adjustment concerning interpretation of administration of this ordinance may be taken by any person aggrieved or by any officer or bureau of the Yakima Indian Nation affected by any decision of the administrative official. Such appeals shall be taken within a reasonable time, not to exceed twenty (20) days, by filing with the administrative official and with the Board of Adjustment a notice of appeal specifying the grounds thereof. The administrative official shall forthwith transmit to the Board all papers constituting the record upon which the action was taken from.

The Board of Adjustment shall fix a reasonable time for the hearing of an appeal, give notice thereof as well as due notice to the parties in interest, and decide the same within a reasonable time. At the hearing, any party may appear in person or by agent or attorney.

4. Stay of Proceedings: An appeal stays all proceedings in furtherance of the action appealed from, unless the administrative official from whom the appeal is taken certifies to the Board of Adjustment after the notice of appeal is filed with him, that by reason of facts

stated in the certificate, a stay would, in his opinion, cause imminent peril to life and property. In such cases, proceedings shall not be stayed other than by a restraining order which may be granted by the Board of Adjustment on application, on notice to the administrative official from whom the appeal is taken on due cause shown.

SECTION 9. THE BOARD OF ADJUSTMENT: POWERS AND DUTIES:

The Board of Adjustment shall have the following powers and duties:

1. Administrative Review: To hear and decide appeals where it is alleged that is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this ordinance.

2. Special Exception: (Conditional Use Permits, Special Property Use Permits), Conditions Governing Applications, Procedure: To hear and decide only such exceptions as the Board of Adjustment is specifically authorized to pass on by the terms of this ordinance; to decide such questions are involved in determining whether special exceptions should be granted; and to grant special exceptions with such safeguards and conditions as are appropriate under this ordinance, or to deny special exceptions when not in harmony with the purpose and intent of this ordinance. A special exception shall not be granted by the Board of Adjustment unless and until;

a) A written application for a special exception shall be submitted to the Board of Adjustment and shall include the following information concerning the property for which the application is being made:

1. Type of use
2. Legal description of property
3. Name and address of legal power

4. Names and address of owners of record of all property within a radius of three hundred (300) feet of the exterior boundaries of subject property
5. Name and address of person submitting application

b) Upon the filing of an application for a special exception, the Board of Adjustment shall set the time and place for a public hearing on such matter, and written notice thereof shall be addressed through the United States mail to all property owners of record within a radius of three hundred (300) feetof the exterior boundaries of subject property. The written notice shall be mailed not less than twelve (12) days prior to the hearing.

The owner of the property for which the special exception is sought shall be notified of the hearing by mail. Notice of such hearing shall be given by publication of at least one notice not less than twelve (12) days prior to the hearing in a newspaper of general circulation within the county, and by posting at Yakima Indian Agency for not less than twelve (12) days prior to the hearing.

c) The public hearing shall be held. Any party may appear in person or by agent or attorney, designated as such in writing, and filed with the Board prior to the hearing.

d) The Board of Adjustment shall make a finding that is empowered under the section of this ordinance described in the application to grant the special exception, and that the granting of the special exception will not adversely affect the public interest.

In granting any special exception, the Board of Adjustment may prescribe appropriate conditions and safeguards in conformity with this ordinance. Violation of such conditions and safeguards, when

made a part of the terms under which the special exception is granted, shall be deemed a violation of this ordinance and punishable under Section 16 of this ordinance. The Board of Adjustment shall prescribe a time limit which the action for which the special exception is required shall be begun or completed, or both. Failure to begin or complete, or both, such action, within the time limit set shall void the special exception.

3. Variances, Conditions Governing Applications, Procedures: To authorize upon appeal in specific cases such variances from the terms of this ordinance as will not be contrary to the public interest where, owning to special conditions, a literal enforcement of the provisions of the terms of this ordinance shall not be granted by the Board of Adjustment unless and until:

a) A written application for a variance is submitted demonstrating:

1. That special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures, or buildings in same district;
2. That literal interpretation of the provisions of this ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this ordinance;
3. That the special conditions and circumstances do not result from the actions of the applicant;
4. That granting the variance requested will not confer on the applicant any special privilege that is denied by this ordinance to other lands, structures, or buildings in the same district.

b) Notice of public hearing shall be given as in Section 9 (2[b]) above;

c) The public hearing shall be held. Any party may appear in person or by agent or attorney designated as such in writing and filed with the Board prior to the hearings;

d) The Board of Adjustment shall make findings that the requirements of Section 9(3[a]) have been met by the applicant for a variance;

e) The Board of Adjustment shall further make a finding that the reasons set forth in the application justify the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of the land, building, or structure;

f) The Board of Adjustment shall further make a finding that the granting of a variance will be in harmony with the general purpose and intent of this ordinance, and will not be injurious to the neighborhood, or otherwise detrimental to the public welfare.

In granting a variance, the Board of Adjustment may prescribe appropriate conditions and safeguards in conformity with this ordinance. Violation of such conditions and safeguards, when made a part of the terms under which the variance is granted, shall be deemed a violation of this ordinance and punishable under Section 16 of this ordinance.

4. Decisions of the Board of Adjustment: In exercising the above-mentioned powers, the Board of Adjustment may, so long as such action is in conformity with the terms of this ordinance, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination as ought to be made, and to that end shall have powers of the administrative official from whom the appeal is taken.

The concurring vote of a majority of members of the Board shall be necessary to reverse any order, requirement, decision, or determination of the administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under this ordinance, or to effect any variation in the application of this ordinance.

SECTION 10. APPEALS FROM THE BOARD OF ADJUSTMENT

Nothing in this ordinance shall be construed to be a waiver of sovereign immunity by the Yakima Indian Nation, and its officers and agents.

SECTION 11. DUTIES OF ADMINISTRATIVE OFFICIAL, BOARD OF ADJUSTMENT, AND COURTS, ON MATTERS OF APPEAL

It is the intent of this ordinance that all questions of interpretation and enforcement shall be first presented to the administrative official, and that such questions shall be presented to the Board of Adjustment only on appeal from the decision of the administrative official.

SECTION 12. SCHEDULE OF FEES, CHARGES AND EXPENSES

The Board of Adjustment may establish a schedule of fees, charges and expenses, and a collection procedure, for building permits, appeals, and other matters pertaining to this ordinance.

SECTION 13. AMENDMENTS

1. The regulations, restrictions and boundaries set forth in this ordinance may from time to time be amended, supplemented, changed, or repealed by action of the Tribal Council after a recommendation thereon from the Planning Commission and after a public hearing. An amendment, supplement or change may be initiated by the Tribal Council, the Planning Commission, or by a petition of the property owners.

2. The owner of any property may petition the Planning Commission for a change in use districts classification. Any person desiring a reclassification of any property shall file a petition at least fourteen (14) days before the Planning Commission meeting at which his application is to be considered. The petition shall be on a form provided by the Planning Commission and shall convey the following information:

a) Legal description of property to be reclassified;
b) Signature of owner or owners of property;
c) Names, addresses, and legal description of the owners of all property lying within a distance of 300 feet (streets and alleys included) of the proposed reclassification;
d) Such other information as the Planning Commission may require to clarify the application.

The signature of any person or persons having a contract right as Purchaser, to receive title to any lot or parcel of property upon completion of the purchase price therof shall for the purpose of this ordinance be deemed the signature of the owner of such property provided that said person or persons state in writing over their signatures that they are purchasing the property in question under the contact.

With each petition for a use district reclassification there shall be paid a fee as may be established in Section 12 to cover costs incurred by the Yakima Nation in processing the petition.

SECTION 14. PROVISIONS OF ORDINANCE DECLARED TO BE MINIMUM REQUIREMENTS

In their interpretation and application, the provisions of this ordinance shall be held to be minimum requirements, adopted for the promotion of the public health, safety, morals or general welfare. Whatever the requirements of this ordinance are at variance with the require-

ments of any other lawfully adopted rules, regulations, ordinances, deed restrictions or covenants, the most restrictive or that imposing the higher standards, shall govern.

SECTION 15. COMPLAINTS REGARDING VIOLATIONS

Whenever a violation of this ordinance occurs, or is allege to have occurred, any person may file a written complaint. Such complaint stating fully the causes and basis thereof shall be filed with the administrative official. He shall record properly such complaint, immediately investigate, and take action thereon as provided by this ordinance.

SECTION 16. PENALTIES FOR VIOLATION

All uses of property not in conformity with this resolution, shall be enjoined and in extreme cases the violators excluded from the Yakima Indian Reservation.

SECTION 17. SEPARABILITY CLAUSE

Should any section or provisions of this ordinance be declared by the courts to be unconstitutional or invalid, such decision shall not affect the validity of the ordinance as a whole, or any part thereof other than the part so declared to be unconstitutional or invalid.

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SECTION 19. (A) AGRICULTURAL:

The (A) Agricultural district is established as a district in which the principal use of the land is for agricultural purposes.

In order that (A) Agriculture district shall further promote the general purpose of this ordinance, the specific intent of this district is:

a) To assure that those portions of the Reservation containing prime agricultural soils will be preserved for agricultural purposes;

b) To encourage the use and preservation of those limited and irreplaceable portions of the Reservation which contain the proper combination of soil and topographical characteristics for intense agricultural development;

c) To prohibit any uses of the land which would interfere with the development or continuation of agricultural uses in this district;

d) To establish minimal development standards which will assure a continuation of the open and rural character of the district and to permit only those uses and activities which are compatible with this rural character.

The following regulations shall apply to the Agricultural District:

1. Use: No building, structure, or land shall be used and no building or structure shall be hereafter erected, altered, enlarged or maintained in this district except for the following uses:

a) Agriculture, floriculture, horticulture, general farming, dairying, poultry raising, stock raising and other agricultural land uses, buildings and activities, except farms for disposal of garbage and offal by feeding same to livestock;

b) Plants for the processing and storage of agricultural products, such as fruit packing plants, canneries, milk plants, warehouses, fruit and vegetable cold storage plants, etc.;

c) Stands for the display and sale of products raised or grown on the premises when located not less than twenty (20) feet from the right of way of any public street or highway;

d) Accessory buildings ordinarily appurtenant to

the conduct of farming and agriculture and when located not less than seventy-five (75) feet from any public street or highway;

e) Public parks and playgrounds;

f) Single-family dwellings;

g) Home occupations;

h) Uses customarily incidental to any of the above uses;

i) Special property uses specifically allowed in this district as listed in Section 25.

2. Area Regulations:

a) Lot Size: The minimum lot size in this district shall be 5 acres.

b) Front: There shall be a minimum set-back for all buildings or other structures from the centerline of right-of-way as follows:

Right-of Way, Public	Set-Back
Major or Secondary Arterials	60 feet
Collector or Access Roads	50 feet
Right-of-Way, Private	
Any road, lane, street, or other access way in private ownership	50 feet
Any waterway	200 feet

There shall be a minimum set-back for facilities belonging to any individual, private or public irrigation or drainage district, company or corporation, or any private or public utility, except those located within the right-of-way by franchise from the Yakima Indian Nation, from the centerline or rights-of-way as follows:

Rights-of-Way, Public	Set-Back
Major or Secondary Arterials	40 feet
Collector or Access Roads	30 feet
Rights-of-Way, Private	30 feet

Side: There shall be a side set-back of not less than ten (10) feet on each side of a structure.

3. Other Regulations:

a) Signs: The following signs only shall be permitted in this district:

1. One (1) unlighted sign not exceeding six (6) square feet in area pertaining only to the sale, lease, rent, or hire of only the particular building, property or premises upon which displayed.
2. Signs advertising the sale or promotion of agricultural products raised or grown on the premises shall not exceed a total area of one hundred (100) square feet.
3. Name plates not exceeding two (2) square feet in area bearing only the name and occupation of the occupant.

SECTION 20. (R) RESIDENTIAL:

The (R) Residential district is established as a district in which the principal use of the land is for residential construction and land development of varying densitites designed to meet contemporary building and living standards.

In order that the (R) Residential district shall further promote the general purposes of this ordinance, the specific intent of this district is:

a) To encourage the construction of, and the continued use of the land for various residential purposes.

b) To prohibit commercial and industrial uses of the land and to prohibit any other uses which would substantially interfere with the development or construction of residential uses;

c) To encourage the discontinuance of existing uses which would not be permitted as new uses under the provisions of this ordinance;

d) To prohibit any use which because of its character or size creates requirements and costs for public services, such as police and fire protection, water supply and sewage facilities, substantially in excess of such requirements and costs if the district were developed solely for residential purposes.

The following regulations shall apply to the Residential Districts:

1. Use: No building, structure, or land shall be used and no building or structure shall be hereafter erected, altered, enlarged or maintained in this district except for the following uses:

a) Single-family dwellings

b) Two-family dwellings

c) Multiple-family dwellings and apartment houses

d) Public parks and playgrounds

e) Farming, gardening, orchards and nurseries, provided that no retail or wholesale business office is maintained, and provided that no poultry or livestock, other than normal household pets, shall be housed within one hundred (100) feet of any residence other than the dwelling on the same lot.

f) Home occupations as defined in Section 18.

g) Accessory buildings such as are ordinarily appurtenant to the permitted uses in this district.

h) Where the side of a lot abuts on a Commercial or Industrial district, the following transitional uses are permitted provided they do not extend more than one hundred (100) feet into the more restricted (residential) district:

1. Medical or dental offices and clinics;

2. Other uses of a transitional nature as determined by the Planning Commission. These transitional uses shall conform to all other requirements of this ordinance which apply.

i) Special Property uses specifically allowed in this district as listed in Section 25.

2. Area Regulations:

a) Lot size and percentage of coverage:

1. Single family dwelling — no single family dwelling shall hereafter be erected upon any lot or plot having an area of less than seven thousand two hundred (7200) square feet, or an average width of less than sixty (60) feet. Nor shall the building, including its accessory buildings, cover more than fifty (50) percent of the total lot area.

2. Two-family dwelling — No two-family dwelling shall hereafter be erected upon any lot or having an area of less than eight thousand two-hundred (8200) square feet, or an average width of less than eighty

(80) feet. Nor shall the building, including its accessory buildings, occupy or cover more than fifty (50) per cent of the total lot area.

3. Multiple-family dwellings — No multiple family dwelling of three (3) or more residential units shall hereafter be erected upon any lot or plot having an area of less than nine thousand two hundred (9200) square feet, or an average width of less than inety (90) feet. Nor shall an apartment or multiple-family dwelling of any type be erected in such a manner as to provide less than two thousand (2000) square feet of land area for each living unit including the land on which the unit is built. No multiple family dwelling or apartment, including its accessory buildings, shall occupy or cover more than fifty (50) percent of the total lot area.

b) Larger lot size for individual water and sewage systems or community water and sewage systems may be required by enactment of a Tribal Health Code, or by determination of the administrative official.

c) Set-back requirements:

1. Front: There shall be a minimum set-back for all buildings or other structures from the center-line of rights-of-way as follows:

Rights-of-Way, Public	Set-Back
Major or Secondary arterials	60 feet
Collector or access roads	50 feet
Rights-of-Way, Private	

Any road, lane, street, or other access way in private ownership	50 feet
Any Waterway	200 feet

There shall be minimum set-back for facilities belonging to any individual, private or public irrigation or drainage district, company or corporation, or any private or public utility, except those located within the right of way by franchise from the Yakima Indian Nation from the centerline or rights of way as follows:

Rights-of-Way, Public	Set-Back
Major or Secondary arterials	40 feet
Collector or access roads	30 feet
Rights-of-Way, Private	30 feet

2. Side: There shall be a side set-back of not less than five (5) feet on each side of a dwelling except that a set-back on a corner lot shall not be less than ten (10) feet along the flanking or side street line.

3. Rear: There shall be a rear set-back of not less than fifteen (15) feet in the rear of each dwelling. Accessory building may be located in the rear of each dwelling. Accessory buildings may be located in the rear yard provided they shall maintain a set-back of five (5) feet from any lot line.

d) Height requirements: No building shall exceed a height of forty-five (45) feet or three stories, whichever is the lesser.

3. Other Regulations:

1) Parking requirements: Parking and loading space shall be provided as specified by Section

26.

b) Signs: The following signs only shall be permitted in this district:
   1. One (1) unlighted sign not exceeding six (6) square feet in area pertaining only to the sale, lease, rent, or hire of only the particular building, property or premises upon which displayed.
   2. A sign advertising the sale of agricultural products raised or grown on the premises not to exceed six (6) square feet in area.
   3. Name plates not exceeding two (2) square feet in area bearing only the name and occupation of the occupants, and when so used shall be located on the property and off the right-of-way.
   4. In transitional areas a sign, illuminated or otherwise but not of a flashing intermittent type, with a maximum area of eighteen (18) square feet shall be permitted. Any external sign displayed shall pertain only to the use conducted within the building and shall be mounted flat against the building. Artificially illuminated signs shall not be permitted if they face an abutting residential district.

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SECTION 23. (RA) RESERVATION RESTRICTED AREA

The Restricted Area District is established to insure continuation of the Tribal Natural Resources and to insure the Treaty right of tribal members to have an area in which they may camp, hunt, fish, and gather roots and berries in the tradition of their culture. This District

is therefore closed to all non-tribal members other than persons bearing permits. Upon the issuance of a permit by the Tribal Council with respect to tribal lands, roads and resources, the Superintendent of the Yakima Agency will issue permits for travel on roads in the closed areas only to present owners of record of lands within the closed area as of May 6, 1972, to persons or firms doing business with the Yakima Nation or the Bureau of Indian Affairs; employees of the Yakima Nation and the Bureau of Indian Affairs; and to others who are engaged in activities of direct benefit to the Yakima Nation.

In order that the nature of the restricted area be protected only the following uses will be permitted:

1. Harvesting wild crops
2. Grazing, timber production or open field crops
3. Hunting or fishing by Tribal members
4. Camping in temporary structures
5. Tribal camps for the education and recreation of tribal members
6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of Tribal resources.
7. No building or other permanent structure or any appurtenances thereto other than those allowed in Sections 1-6 above shall be allowed in this district.
8. Any structure which is authorized in Section 1-6 above shall be set back 200 feet from any waterway.

SECTION 24. (PD) PLANNED DEVELOPMENT

1. Purpose: The purpose of this section providing for

the establishment of a Planned Development District, is to:

a) Encourage flexibility in design and development that will encourage a more creative approach in the development of land, and which will result in a more efficient, aesthetic and desirable use of the land.
b) Permit flexibility in design, placement of buildings, use of required open spaces, circulation facilities, off-street parking areas and otherwise to better utilize the potentials of sites characterized by special features of geography, topography, size or shape.
c) Facilitate the adequate and economical provision of streets and utilities.
d) Preserve the natural and scenic qualities of open areas.

2. Notification of Intent: The applicant for a Planned Development project to be governed by the provisions of this section shall file with the Planning Commission a preliminary notice of the applicant's intention to apply for a Planned Development District, giving such preliminary information concerning the proposed project as may be requested by the Planning Commission on forms furnished by them. Such preliminary notice shall be signed by the owner of all property to be involved in the Planned Development District, if such property is owned by one person, or by all persons claiming any right, title or interest of record in and to such property if it is owned by more than one person.

3. Preliminary Development Plan and Program: After filing the preliminary notice required by Subsection 2 above, the applicant for a Planned Development District shall file with the Planning Commission a preliminary plan and program for the area within the

boundry of the project, which plan and program shall consist of the following:

a) A dimensional map drawn to a scale of not less than 1 inch to 100 feet, depicting the following:
   1. The boundaries of the site
   2. Names and dimensions of all existing streets bounding or touching the site of the proposed location
   3. Horizontal, vertical dimensions and types of all buildings and structures proposed to be located on the site
   4. Proposed location and dimension of "common open space"
   5. Proposed public dedications
   6. Location, dimension and design of off-street parking facilities, showing points of ingress and egress from the site
   7. Location and direction bearing of all major physiographic features such as railroads, drainage canals and shorelines
   8. Existing topographic contours at intervals of not more than five (5) feet, together with proposed grading and drainage landscaping
   9. Proposed land uses and densities
   10. Pedestrian and vehicular circulation pattern

b) A written program for development setting out detailed information concerning the following subjects as they may be involved in or provided for by the Planned Development project:

1. Proposed ownership pattern
2. Operation and maintenance proposals, i.e., homes, associations, condominium, co-op or other
3. Waste disposal facilities
4. Lighting
5. Water supply
6. Public transportation
7. Community facilities
8. General time table of development

4. Informal Review by Planning Commission: The Planning Commission shall informally review the preliminary development plan and program and may recommend additions or modifications to, or other changes in, the proposed plan or program.

5. Rezone Application: Upon the completion of the informal review of the preliminary development plan and program by the Planning Commission, the applicant may submit a verified rezone application requesting a change of zone to Planned Development District pursuant to Section 13 of this ordinance.

6. Rezone Hearings and Findings: The application for rezone to a Planned Development District shall be heard before the Planning Commission of the Yakima Indian Nation at a public hearing within the time and in the manner provided by Section 13 of the Yakima Indian Nation Amended Zoning Ordinance. The recommendation of the Planning Commission to approve or deny the application shall be based on the following criteria:

a) Substantial conformance to this Amended Zoning Ordinance;
b) The proposal's harmony with the surrounding area, or its potential future use;

c) The system of ownership and means of development, preserving and maintaining space;
d) The adequacy of the size of the proposed district to accommodate the contemplated development.

7. Decision of the Planning Commission — Subsequent Procedure:

a) At the conclusion of the hearing by the Planning Commission, as provided for in Section 13, the Planning Commission shall adopt a motion on the affirmative vote of a majority of its voting members which shall recommend to the Tribal Council that the application for rezone to Planned Development District be either approved, denied, or approved with modifications specified by the Planning Commission in its motion. Within ten calendar days from the date of such action, the Secretary of the Planning Commission shall mail the applicant at the address shown on the rezone application, notification of the Planning Commission's recommendations.
b) The procedure provided for by Section 13 of the Yakima Indian Nation Amended Zoning Ordinance shall be followed to afford a review by the Tribal Council of the Planning Commission's recommendation, and to provide for the granting or denying by the Tribal Council of the rezone application.

8. Final Development Plan and Program: Upon being granted a rezone by action of the Tribal Council, the applicant shall prepare a final development plan and program containing the enumerated elements and meet-

ing the density, open space and other requirements listed below.

a) Plan Elements
   1. Existing maps drawn to a scale of not less than 1 inch to 100 feet and proposed contour map
   2. Location, with the names, of all existing and proposed streets, public ways, railroad and utility rights-of-way, parks or other open spaces and all land uses within 500 feet of the boundary of the development
   3. Existing sewers, water mains, and other underground facilities within and adjacent to the development and their certified capacities
   4. Proposed sewer or other waste disposal facilities, water mains and other underground utilities
   5. Preliminary subdivision plan
   6. Proposed land use plan
   7. Community facilities plan
   8. Location and amount of open space
   9. Traffic flow plan
   10. Location and dimension of walks, trails or easements
   11. Location, arrangement, number and dimensions of truck loading and unloading spaces and docks
   12. Location, arrangement, number and dimensions of auto garages and parking spaces, width of aisles, bays and angles of parking
   13. Preliminary plans, elevation of typical building and/or structures, indicating

general height, bulk and number of dwelling units
   14. Approximate location, height, and materials of all walls, fences and screen plantings
   15. Indication of stages of development

b) Program Elements
   1. Statement of goal and objectives, i.e., why it would be in the public interest and be consistent with this Amended Zoning Ordinance
   2. Evidence of resources available to develop the project
   3. Tables showing total number of acres, distribution of area by use, percent designated for each dwelling, type of off-street parking, streets, parks, playgrounds, schools and open spaces
   4. Tables indicating over-all densities and density-by-dwelling-types, and any proposal for the limitations of density
   5. Restrictive covenants, other than those relating to retension and maintenance of common open space

c) Project Densities: The Planning Commission may recommend approval of a population density for a planned development even though such density may be greater than that specified in this Amended Zoning Ordinance for the area containing the planned development, if, in the opinion of the Planning Commission, the design of the planned development will not result in inconvenient or unsafe access to the planned development or excessive burden on parks, recreation area,

schools and other public facilities which serve or are proposed to serve the planned development.

d) Common Open Space Requirements:
   1. Common Open Space in a Planned Development
      a. The location, shape, size and character of the open space must be suitable for the Planned Development
      b. Common open space must be suited for amenity or recreational purposes. The uses authorized for the common open space must be appropriate to the scale and character of the planned development, considering its size, density, expected population, topography and number and type of dwelling units to be provided
      c. Common open space must be suitably improved for its intended use, but common open space containing natural features may be left unimproved. The buildings, structures and improvements which are permitted in the common open space must be appropriate to the uses which are authorized for common open space and must conserve and enhance the amenities of the common open space in regards to its topography and unimproved condition.

2. The development schedule, which is part of the development plan, must coordinate improvement of common open space, construction of buildings, structures and improvements in the common open space, and the construction of residential dwellings in the planned development.

e) Retention and Maintenance of Common Open Space:
   1. The final development plan and program shall include a provision approved by the Planning Commission as being sufficient to assure permanent retention and maintenance of the common open space in a Planned Development District. Such assurance may be in the form of restrictive covenants, dedication of open space to the public where such dedication will be accepted by the Tribal Council, an undertaking by an association of owners of the property within the Planned Development District, or in any other form or by any other method approved by the Planning Commission as being practical and legally sufficient to assure the permanent retention and maintenance of the common open spaces. All legal documents to carry out the plan and program in this regard shall be filed by the applicant with the final development plan and program, and shall be subject to approval as form by the Trial Attorney. All such plans and programs shall contain provisions whereby the Yakima Indian Nation will be vested with the right to enforce the permanent retention and maintenance of the common open space and further that in the event the common open space is permitted to deteriorate, or is not maintained in a condition consistent with the approved plan and program, then in such event that the Yakima Indian Nation may at its option cause necessary maintenance to be performed and assess the cost thereof to

the owners of the property within the Planned Development District.

2. No common open space may be put to any use other than as specified in the approved final development plan unless the development plan has been modified to permit such other use pursuant to subsection 7 of this section. No such modification of use shall be deemed as a waiver of any of the provisions of the approved final development plan, assuring the permanent retention and maintenance of the common open space.

f) Undergrounding of Utilities: In any planned development which is primarily designed for or occupied by dwellings, all electric lines, telephone facilities, fire alarm conduits, street light wiring and other wiring conduits and other similar facilities shall be placed underground by the developer, unless this requirement is waived by the Planning Commission.

9. Final Approval: The final development plan and program meeting the requirements listed in the preceding sections shall be presented to the Planning Commission with a request for final approval.

10. Building permits shall be issued for construction only in accord with the plan and program elements of the plan as finally approved by the Planning Commission.

11. Modification to Development:

a) Major Modification: Application for major modifications in the final development plan

and program must be submitted to the Planning Commission, and hearings held and recommendations made by it, and the Tribal Council as if such application were an original application for a Planned Development District.

b) Minor Modification: Minor modification in the final development plan and program may be approved by the Director of Planning. Such changes may include minor shifting of the location of buildings, proposed streets, public or private ways between the easements, parks or other features of the plan, but shall not include those changes of boundaries, changes in land use or other changes of location which are not devoted to specific land uses.

12. Review of Grant to Rezone: If, within three years after the granting of an application for a Planned Development District, substantial construction has not been performed on the approved project, the Planning Commission shall review on its own motion the grant of such rezone application at the public hearing after giving written notice of such hearing to all persons claiming any right, title or interest of record in and to the affected property, which notice shall be given at least twenty (20) days prior to such hearing, and after otherwise giving notice of such hearing as required by this Amended Zoning Ordinance. Such hearings shall be held at times, and in the manner, prescribed by said ordinance and may be continued as provided therein. At such hearings, the Planning Commision shall adopt a motion on the affirmative vote of a majority of its voting members which shall recommend to the Tribal

Council that the existence of such Planned Development District be continued, or that the area within such Planned Development be rezoned to another zone. In the event such recommendation is that the area be rezoned, the procedure specified in Section 13 of this Amended Zoning Ordinance shall be followed to effect such rezone. The section shall not be construed so as to divest the Planning Commission and the Tribal Council of authority to otherwise rezone property within a Planned Development District pursuant to and in accordance with the provisions of Section 13 of this ordinance.

13. Reconstruction of Buildings or Improvements: Replacement or reconstruction of any buildings or improvements to buildings damaged or destroyed shall substantially conform to the originally approved Planned Development Plan.

14. Any waterway: No planned development project will be allowed within 200 feet of any waterway.

* * * *

DONE ON _____, 1972,

by a vote of_____ for and _____ against.

/s/_____
Robert B. Jim, Chairman
Yakima Tribal Council

ATTEST:

/s/ _____
Genevieve Hooper, Sec.
Yakima Tribal Council

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

HIGHWAY SYSTEM
YAKIMA INDIAN RESERVATION

YAKIMA AND KLICKITAT COUNTIES, WASHINGTON

CONTOUR INTERVAL 100 FEET

COMPILED FROM U.S.G.S. QUADRANGLE MAPS
REVISED FROM AERIAL PHOTOS DATED AUGUST 1973

DATUM IS MEAN SEA LEVEL

BEST AVAILABLE COPY

Nos. 87-1622, 87-1697, and 87-1711

Supreme Court, U.S.
FILED
SEP 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONER STANLEY WILKINSON

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QUESTIONS PRESENTED

1. Does the Yakima Indian Tribe have the authority to control through comprehensive zoning the use of fee land located within both Yakima County and the Yakima Reservation when that land has been alienated pursuant to the federal policy of land allotment to Reservation residents who are not members of the Yakima Tribe, and when the land in question has previously been subject to Yakima County's zoning authority?

2. Does a federal court of appeals proceed properly under Fed. R. Civ. P.52(a), when it independently determines whether a tribe may exercise authority over the fee-owned land of non-members of the tribe despite district court findings that the factual predicates for the existence of tribal authority are absent?

3. May Congress, consistent with the Fifth Amendment to the United States Constitution, sanction a tribe's comprehensive regulation of the reservation fee land of non-members, when those non-members are disenfranchised on the basis of ancestry and cultural affiliation from participation in tribal government, and when they may not secure direct judicial review of tribal land use decisions?

LIST OF PARTIES

The petitioners are: Stanley Wilkinson, a non-member of the Yakima Tribe who owns and resides upon land located within both Yakima County and the Tribe's Reservation; the County of Yakima and its three County Commissioners, Jim Whiteside, Graham Tollefson and Charles Klarich; Richard F. Anderwald, the Director of Yakima County's Planning Department; and, Philip Brendale, a non-member of the Tribe who owns land within the Reservation. The respondent is the Confederated Tribes and Bands of the Yakima Indian Nation. Jim Gatliff and Dick Keller, who at the time of suit were prospective purchasers of a portion of petitioner Wilkinson's reservation land, were aligned as defendants-appellees below and have filed a notice of appearance in this matter.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	4
A. Introduction	4
B. The Treaty With The Yakima and the evolution of the Reservation	5
C. The current character of the Reservation	9
1. The closed area	9
2. The open area	10
D. County and Tribal land use regulation in the open area	12
1. County regulation	12
2. Tribal regulation	14
E. Wilkinson's property and the decisions below	16
SUMMARY OF ARGUMENT	24
ARGUMENT	26
I. Neither inherent tribal sovereignty nor the Treaty With The Yakima support the Yakima Indian Tribe's claim that it possesses the power to regulate the use of fee land within the boundaries of its Reservation when that land has been conveyed to non-members of the Tribe pursuant to the federal policy of land allotment	26
A. The Yakima Tribe's dependent status is necessarily inconsistent with retention of an inherent power to control the use of property owned in fee by non-members of the Tribe	26

TABLE OF CONTENTS—Continued

	Page
1. Tribal sovereignty entails only what is necessary for the Tribe to govern its members	26
2. Tribal authority over the fee land of non-members constitutes an impermissible intrusion into those non-members' civil rights	30
3. Regulatory authority over non-member fee land is not necessary to the Tribe's political integrity, economic security or health and welfare	31
B. The federal policy of land allotment has divested the Yakima Tribe of any Treaty right to regulate the use of non-member fee land within its Reservation	33
1. The Allotment Act divested the Tribe of power over non-member owners of fee land	34
2. The Reservation's demographic characteristics illustrate Congress's intent to displace tribal authority over allotted, non-member fee land	37
3. The Ninth Circuit's decision ignores the allotment policy and turns on inappropriately political considerations	38
C. The Ninth Circuit proceeded improperly under Federal Rule of Civil Procedure 52(a) when it independently redetermined whether the Tribe possessed authority over the use of non-member fee land within the Reservation	41
II. The Ninth Circuit's decision should be reversed because it sanctions a delegation of unconstitutional authority over non-members of the Tribe	42
CONCLUSION	45

TABLE OF AUTHORITIES

Cases	Page
Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985)	42
Ashwander v. TVA, 297 U.S. 288 (1936)	45
Bi-Metallic Company v. Colorado, 239 U.S. 441 (1915)	43
Bose Corporation v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)	42
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)	25, 43
Confederated Tribes And Bands Of The Yakima Indian Nation v. County of Yakima, et al., No. C-87-654-AAM (E.D. Wa. 1988)	11
DeCoteau v. District County Court For The Tenth Judicial District, 420 U.S. 425 (1975)	37, 40
Draper v. United States, 164 U.S. 240 (1896)	34
Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981)	44
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. ——, 107 S. Ct. 2378 (1987)	30, 43
Fletcher v. Peck, 6 Cranch (10 U.S.) 87 (1810)	27
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)	25, 39
Iowa Mutual Insurance Company v. La Plante, 480 U.S. 9, 107 S. Ct. 971 (1987)	43
Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982)	32
Londoner v. Denver, 210 U.S. 373 (1908)	43
Luther v. Borden, 7 How. (48 U.S.) 1 (1849)	39
Lyng v. Northwest Indian Cemetery Protective Association, —— U.S. ——, 108 S. Ct. 1319 (1988)	44
McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973)	28
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	28
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)	26

TABLE OF AUTHORITIES—Continued

	Page
Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976)	40
Montana v. United States, 450 U.S. 544 (1981)	*passim*
National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. 845 (1985)	44
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)	22, 26, 35
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	24, 27, 30, 31, 44
Puyallup Tribe, Inc. v. Department Of Game Of The State Of Washington, 433 U.S. 165 (1977)	34
R.J. Williams Company v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985)	44
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)	24, 37, 38
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	28, 44
Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962)	40
Solem v. Bartlett, 465 U.S. 463 (1984)	37, 38
Talton v. Mayes, 163 U.S. 376 (1896)	28
Three Affiliated Tribes Of The Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986)	44
Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980)	44
United States v. Kagama, 118 U.S. 375 (1886)	27
United States v. Mazurie, 419 U.S. 544 (1975)	42
United States v. Montana, 604 F.2d 1162 (9th Cir. 1979), *rev'd*, 450 U.S. 544 (1981)	22
United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)	40
United States v. Wheeler, 435 U.S. 313 (1978)	27, 42
Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926)	30, 43
Washington v. Confederated Bands And Tribes Of The Yakima Indian Nation, 439 U.S. 463 (1979)	40

TABLE OF AUTHORITIES—Continued

	Page
Wesberry v. Sanders, 376 U.S. 1 (1964)	30, 43, 44
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	22
Williams v. Lee, 358 U.S. 217 (1959)	26
Winters v. United States, 207 U.S. 564 (1908)	32
Worcester v. Georgia, 6 Pet. (31 U.S.) 515 (1832)	26
Federal Constitution	
Fifth Amendment	3, 25, 42, 43, 44
Washington Constitution	
Article XI	4
Statutes, Administrative Regulations, & Court Rules	
25 U.S.C. § 331 *et seq.*	*passim*
25 U.S.C. § 450 *et seq.*	36
25 U.S.C. § 608	36
25 U.S.C. § 1301-1303	28
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	44
28 U.S.C. § 1343	17
28 U.S.C. § 1362	17
42 U.S.C. § 1983	18
Act of July 23, 1894, c. 152, 28 Stat. 118	8
Act of March 1, 1899, c. 324, 30 Stat. 940	8
Act of May 31, 1900, c. 598, 31 Stat. 246	8
Act of December 21, 1904, c. 22, 233 Stat. 595	7
Act of March 6, 1906, c. 518, 34 Stat. 53	7
Act of May 24, 1922, c. 199, 42 Stat. 552	8
Act of June 7, 1935, c. 197, 49 Stat. 330	9
Act of September 26, 1961, Pub. L. 87-316, 75 Stat. 680	8
Fed. R. Civ. P. 52(a)	3, 4, 25, 41, 42
RCW § 36.70	4
RCW § 43.21C	13
WAC 197-11-500	13
WAC 197-11-724	13

TABLE OF AUTHORITIES—Continued

	Page
Treaties	
Treaty With The Omaha, 10 Stat. 1043 (1854)	6
Treaty of Medicine Creek, 10 Stat. 1132 (1855)	33, 34
Treaty With The Yakima, 12 Stat. 951 (1859)	*passim*
Other Authorities	
F. Cohen, *Handbook of Federal Indian Law* (1942)	26
C. Kappler, *Indian Affairs, Laws And Treaties*	6, 7, 8, 9
C. Relander, *Strangers On The Land* (1962)	7
N. Williams, *American Land Planning Law* (1974)	23
Senate Report No. 847, 84th Cong., 1st Sess.	36
Comment, *Jurisdiction To Zone Indian Reservations*, 53 Wash. L. Rev. 677 (1978)	23

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONER STANLEY WILKINSON

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 828 F.2d 529 (9th Cir. 1987), and is reprinted in the Appendix to Wilkinson's Petition For A Writ Of Certiorari at page 3a.

The opinions of the District Court in *Whiteside I* and *Whiteside II* are reported, respectively, at 617 F. Supp. 735 and 617 F. Supp. 750, and are reprinted in the Appendix to Wilkinson's Petition For A Writ Of Certiorari at pages 108a and 33a.

The District Court's orally delivered Findings Of Fact And Conclusions Of Law in *Whiteside II* are unreported, but are reprinted at page 80a of Wilkinson's Petition For A Writ Of Certiorari ("W. Pet."), while its unreported oral opinion in *Whiteside I* is reprinted at page 40 of the Appendix to Brendale's Petition For A Writ Of Certiorari.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered a judgment and order on September 21, 1987 affirming the District Court's decision in *Whiteside I*, and reversing and remanding the District Court's decision in *Whiteside II*. (W. Pet. 3a.)

On January 13, 1988, the Court of Appeals for the Ninth Circuit entered an order denying the County of Yakima's timely filed petition for rehearing. (County of Yakima's Petition For A Writ Of Certiorari at 17-A.)

Petitioner Wilkinson invoked this Court's jurisdiction to review the Ninth Circuit's judgment pursuant to 28 U.S.C. § 1254(1). This Court granted Wilkinson's petition for certiorari on June 20, 1988. On that same date, this Court also granted petitioners Brendale and the County of Yakima certiorari. It then consolidated these matters, bringing both *Whiteside I* and *Whiteside II* before this Court. (Joint Appendix ("Jt. App.") 10, Docket Entry of June 27, 1988.)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

Fifth Amendment To The United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Treaty With The Yakima, 12 Stat. 951, *reprinted in* W. Pet. 172a.

The Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.*, *reprinted in* W. Pet. 194a.

Federal Rule of Civil Procedure 52(a):

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts, without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court fol-

lowing the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

A. Introduction

These consolidated cases present the question of whether the County of Yakima, Washington,[1] or the Yakima Indian Tribe has the authority to regulate the use of land owned in fee by non-members of the Tribe, when that federally allotted land is located in Yakima County but within the exterior boundary of the Yakima Indian Reservation. Petitioner Wilkinson's case (*"Whiteside II"*), concerns the conflicting claims of County and Tribe to the authority to zone a piece of his fee land located on the edge of an approximately 350,000 acre portion of the 1.3 million acre Reservation termed the "open area". That region, approximately half owned in fee, has a population that is 80% non-Indian. The County has exercised regulatory jurisdiction over non-trust land in the open area for a hitherto uninterrupted period of thirty-five years. Petitioner Brendale's case (*"Whiteside I"*), concerns fee land he owns within the other two-thirds of the Reservation. That region is termed the "closed area," and is primarily uninhabited timber acreage and range land. The County has asserted jurisdiction over closed area fee land as well.

The District Court held in separate actions that the County possessed exclusive zoning jurisdiction over the Wilkinson property, and that the Tribe held that authority over Brendale's land. In a decision embracing both cases, the Ninth Circuit Court of Appeals affirmed the

[1] Yakima County is a political subdivision of the State of Washington. *See* Wash. Const. Art. XI. The County exercises its land use authority pursuant to the State Constitution and state land use planning statutes. *See* Wash. Const. Art. XI, § 11; RCW Ch. 36.70.

result as to Brendale, but reversed the Wilkinson ruling. It held that the Tribe had the sovereign authority to zone comprehensively all of the land within its Reservation. By so ruling, the Ninth Circuit inappropriately expanded Tribal authority beyond self-government to include power over the constitutionally protected interests of non-members who, although citizens residing within these United States, may not participate in Tribal government, nor secure direct judicial review—in federal, state or Tribal Court—of Tribal land use decisions affecting their property.

B. The Treaty With The Yakima and the Evolution of the Reservation

In 1855, Isaac Stevens, the governor of the Territory of Washington, negotiated a treaty between the United States and fourteen separate bands of Indians that occupied lands extending from Mt. Rainier in the west to the south-central portion of what is now the State of Washington. (Wilkinson's Petition For A Writ Of Certiorari ("W. Pet.") 172a-177a.) For purposes of the Treaty, the fourteen tribes and bands joined together and were to be considered the Yakima Indian Nation ("Tribe" or "Yakimas"). (W. Pet. 173a-174a.)

In the Treaty, the Yakimas ceded to the United States certain of their lands and acknowledged their dependence upon the federal government. (W. Pet. 174a-177a, 187a.) The Tribe did, however, reserve from the ceded lands a tract that was to be

> set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

(W. Pet. 178a.)

The Treaty provided for the allotment of land to members of the Tribe. (W. Pet. 186a).[2] The Treaty also identified certain limits on the Tribe's ability to act in the criminal and civil spheres. In the same treaty article in which they acknowledged their dependence on the United States, the confederated tribes pledged themselves not to commit "depredations" upon the property of United States citizens and to pay compensation for any Indian taking or destruction of non-Indian property. (W. Pet. 187a.) The Tribe agreed "not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." (W. Pet. 188a.) Further, the Tribe enlisted federal assistance in excluding the use of alcohol from the Reservation. (W. Pet. 188a-189a.)

The Senate ratified the Treaty With The Yakima on March 8, 1859. President James Buchanan signed it on April 18, 1859. (W. Pet. 191a-193a.)

The allotment of Reservation land commenced soon after the Treaty became law:

> Article VI of the Treaty provided authority whereby agents could allot land. This system of granting farms to individuals was employed almost from the beginning.

---

[2] The Treaty shows that it also contemplated the possibility of sale of allotted land to non-Indians. Article VI of the Treaty With The Yakima, dealing with allotments, incorporates by reference the sixth article of the Treaty With The Omaha. (W. Pet. 186a). That cross-referenced article reflects the federal policy of encouraging Indian assimilation, but also provides that if an allottee neglected the "pursuits of industry" or resumed to "rove," the federal government could deem his allotment abandoned and, under certain circumstances, sell it for the Omaha's benefit pursuant to "such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States." Article VI, Treaty With The Omaha, 10 Stat. 1043 (1854), *reproduced in* 2 C. Kappler, *Indian Affairs, Laws And Treaties* at 612-613 (1904).

(C. Relander, *Strangers On The Land* (1962) at 58. The portion of this volume that addresses the allotment process appears in the District Court record as Exhibit 248 ("Ex. 248"), *see* Transcript Of Proceedings in *Whiteside II* ("Tr.") 556, 557.) In 1871, Felix Brunot, the President of the first board of Indian commissioners concerned with the Yakimas, visited the Reservation and recommended the further use of allotments. (Ex. 248 at 59.) He also recommended that allotted land be inalienable for two or three generations. (*Id.*) Even at that early date, therefore, sixteen years before the passage of the Allotment Act, Feb. 8, 1887, c. 119, § 2, 24 Stat. 388, federal officials contemplated that in the usual course allotted land would eventually be alienable. (Ex. 248 at 59.)

Allotment proceeded on the Reservation but did not begin in earnest until after passage in 1887 and subsequent amendment in 1892 of the Allotment Act. (Ex. 248 at 59-60; W. Pet. 194a-214a.) These Congressional enactments changed the Reservation. Federal records show that as of December 1, 1902, the Reservation contained 171,220 acres of allotted land. 1 C. Kappler, *Indian Affairs, Laws And Treaties* ("*Kappler*") (1904) at 1046. "By 1905 a total of 2,484 allotments had been issued. In 1914 when the rolls were closed 440,000 acres had been allotted to 4,506 individuals." (Ex. 248 at 60.) The allotments arose not just pursuant to the Treaty and the Allotment Act, but also under the authority of several statutes providing specifically for the sale of land within the Yakima Reservation. *See, e.g.*, Act of December 21, 1904, c. 22, 233 Stat. 595 (providing for the sale of surplus and unallotted Reservation land) & Act of March 6, 1906, c. 518, 34 Stat. 53 (providing for the sale of surplus, unallotted and allotted land), *reprinted respectively in* 3 *Kappler* at 110 & 159 (1913).

During this same period, the Reservation saw increased development and non-Indian settlement of allotted

land. The towns of Wapato and Toppenish, located within the borders of the Reservation, began their ultimately successful efforts to become incorporated cities. These efforts included the private marketing of platted fee land. (Ex. 248 at 64.) For both cities, the record reflects that the non-Indian developers perceived that the allotment, sale, platting and re-sale of land, and the incorporation of cities, would lead to "police protection" and the non-Indian (or non-federal) control of alcohol regulation. (Ex. 248 at 64.)

Congress further encouraged non-Indian settlement on the Reservation by early providing for Indian leasing to non-Indians of allotted land. *See, e.g.*, Act of March 1, 1899, c. 324, 30 Stat. 940, *in* 1 *Kappler at* 686 *and* Act of May 31, 1900, c. 598, 31 Stat. 246, *in* 1 *Kappler* at 701 (both providing for the Indian leasing of allotted land). Congress has also pursued consistently a program to irrigate land within the Reservation to make it attractive to Indians and non-Indians for farming. *See, e.g.*, Act of July 23, 1894, c. 152, 28 Stat. 118 *in* 1 *Kappler* at 516; Act of May 24, 1922, c. 199, 42 Stat. 552, *in* 4 *Kappler* at 337, 357 (1929); Act of September 26, 1961, Pub. L. 87-316, 75 Stat. 680, *in* 6 *Kappler* at 946 (providing for development of irrigation for Indian and non-Indian water users).

With the allotment process came local governmental presence on the Reservation. Congressional action illustrates at least one example of the federal awareness of local governmental provision of services within the Yakima Reservation. The example concerns the public schools in the City of White Swan, which is located in what is now the closed area of the Reservation. Article V of the Treaty required the United States to establish schools on the Reservation (W. Pet. 182a-183a); it is apparent that by 1935 Congress perceived cooperation with established local authorities to be the best method of satisfying this obligation. On June 7 of that year, Congress authorized

the expenditure of federal funds "for the purpose of *cooperating* with White Swan School District, Numbered 88, Yakima County, Washington for extension and improvement of public school buildings", the condition for such funding being that Indian children be permitted to go to these public schools on the same terms, except for tuition, as non-Indian children. *See* Act of June 7, 1935, c. 197, 49 Stat. 330 (emphasis added), *in* 5 *Kappler* (1941) at 428.

It is against this background that the Tribe and the County took the steps that eventually lead to the Wilkinson and Brendale cases.

C. The Current Character Of The Reservation

1. *The Closed Area*

In 1954, the Tribe declared that the western two-thirds of the 1.3 million acre Reservation—about 807,000 acres, of which 740,000 are in Yakima County—was "'to remain closed to the general public'". (W. Pet. 114a.) Since that date, the Tribe has restricted access to the closed area to members of the Tribe and those holding permits from the Tribe or the Bureau of Indian Affairs ("BIA"). (W. Pet. 115a-116a, 128a.)

The allotment process had made some lasting in-roads into this area of forest and range land. Of the 740,000 acres of closed area land in Yakima County, about 25,000 are held in fee, leaving approximately 715,000 acres of Tribal trust land in the closed area within the County. (W. Pet. 128a-129a.) United States Highway 97 crosses a portion of this region. (W. Pet. 114a.) Other roads into the closed area are maintained by the BIA. (*Id.*) In 1972, the BIA restricted the use of its roads to those otherwise permitted to enter the closed area. (W. Pet. 115a.)

The Tribe derives 90% of its income from timber operations conducted in the closed area. (Tr. 122-124; W.

Pet. 136a.) To the extent those operations involve fee land, the record in *Whiteside I* reflects that they are subject to State regulation under Washington's Forestry Practices Act. (Transcript of Proceedings in *Whiteside I* ("Br.Tr.") at 606.)

Petitioner Philip Brendale owns 160 acres of land inside the closed area. Brendale, who is part Indian but apparently of insufficient blood to be enrolled as a member of the Tribe, inherited his fee land from his mother in 1972; she had acquired her patent for the allotted land in 1963. (W. Pet. 123a-124a.)

2. *The Open Area*

The other one-third of the Reservation is termed the open area. That region, which embraces Wilkinson's property, consists of approximately 350,000 acres (W. Pet. 83a), about half of which is fee-owned (W. Pet. 40a). About 25,000 people live in the open area. Eighty percent of those residents are non-Indian. (Tr. 499; W. Pet. 51a.) The open area includes the incorporated cities of Harrah, population 345; Toppenish, population 6,575; and Wapato, population 3,310. (Tr. 538; W. Pet. 51a.) *See generally*, Ex. 200, Jt. App. 79; Tr. 28, 29, 344-346.

The open area plays a significant role in Yakima County's primarily agricultural economy. Yakima County contains ¼ of the irrigated land in Washington, and in production is one of the top 20 farm counties in the United States. (Tr. 416-417; Ex. 244 at 1-2, Tr. 420, 424, 425.)[3] A little less than ⅓ of that production is attributable to land within the Reservation, which contains about 143,000 of the 330,000 irrigated acres in Yakima County. (Tr. 416-417; Ex. 244 at 1.) Of the 143,000 irrigated acres within the Reservation, 63,179 are owned in fee by non-members of the Tribe, and 67,466 are

[3] These and the immediately following agricultural statistics are based on figures from 1980-83, which were used in the trial court proceedings of 1984. (*See* Ex. 244.)

leased to non-members, leaving about 12,355 acres farmed by Indians. (Tr. 422 & 418.) The irrigated Reservation fee land owned and farmed by non-members yields greater than 50% of the agricultural income attributable to lands within the Reservation, even though it comprises less than 50% of the Reservation's irrigated acreage, because it is planted in permanent crops, such as apples. (Tr. 422-23.)

The County of Yakima maintains close to five hundred miles of public roads in the open area, and provides public education for both Indian and non-Indian children residing on the Reservation. (W. Pet. 52a, 88a; Tr. 144-146.) The County provides police protection on the Reservation. (Tr. 286, 295, 547.) It also provides all Reservation residents with a full array of social and health services, including programs concerned with recreation, mental health, alcoholism, drug abuse and youth protective services. (Tr. 546-547.) The County provides legal services, such as indigent defense, and such other services as those related to the conduct of local and national elections. (*Id.*) At the time of Wilkinson's trial, the County collected property tax on deeded, but not trust land within the Reservation. (Tr. 548.)[4]

The Tribe also provides governmental services in the open area. The Tribe provides police protection in cooperation with Yakima County. (Tr. 286, 291.) The Tribe also maintains a range of social service and other programs. (Tr. 126-130.) As a then member of the Yakima Tribal Council testified, however, while theoretically open to all, those programs actually serve only Indian residents of the Reservation. (Tr. 143-144.)

[4] On May 10, 1988, Judge Alan A. McDonald of the Eastern District of Washington entered a judgment precluding the County from taxing Reservation fee land owned by Tribal members. *Confederated Tribes And Bands Of The Yakima Indian Nation v. County of Yakima, et al.*, No. C-87-654-AAM. That case is on appeal to the Ninth Circuit. Dkt. #88-3926.

All adult citizens of Yakima County, whether Indian or non-Indian, and whether or not resident on the Reservation, are eligible to register and vote in County elections. Only adult enrolled members of the Tribe are eligible to participate in Tribal elections. (Tr. 169.)

D. County And Tribal Land Use Regulation In The Open Area

There are significant procedural and substantive distinctions between County and Tribal land use regulation.

1. *County Regulation*

Yakima County regulates all fee land within its borders except that contained within incorporated cities. (Tr. 545, 442-446.) It does not regulate Tribal trust land. (W. Pet. 47a; Tr. 526-529.) Yakima County began regulating the use of land within its borders in 1946 under a temporary zoning resolution. (W. Pet. 43a; Tr. 437.) In 1965, the County adopted its first zoning law. (W. Pet. 43a.) In 1972, it adopted its first comprehensive zoning ordinance, which was in substance readopted in 1974 after it was struck down for a procedural defect. (*Id.*) The County has sub-area plans to coordinate development in the cities of Toppenish, Harrah and Wapato. (Tr. 443-444.) The Tribe participated in preparing the Toppenish and Wapato plans. (Br.Tr. 467.) In 1981, the County adopted a rural land use plan and in 1982 it adopted a new, two-tier scheme of agricultural zoning mandating lot sizes of either 40 or 20 acres. (Tr. 450; W. Pet. 44a-45a.) The County Code also provides for a zone called "General Rural," which allows for subdivisions of lots averaging one acre in size. (W. Pet. 45a-46a.) The County has a comprehensive subdivision ordinance. (Tr. 453.) The County's goal in this regulation is the preservation of agricultural land through the encouragement of clustered development around cities. (Tr. 442-443; W. Pet. 45a.)

Since 1974, pursuant to State law, the County has had a shorelines master program regulating the use of all

shorelines within the County, including those of the Yakima River and Ahtanum Creek on the Reservation. (Tr. 495-496.) In 1974, the County began participating in the federal flood insurance program, which allows all Reservation residents of deeded land—both Indian and non-Indian—to participate in that scheme. (Tr. 496-497; W. Pet. 46a.) Also, pursuant to Washington's Environmental Policy Act, RCW § 43.21C, the County requires environmental review prior to approval of land use decisions. (W. Pet. 46a-47a.) In implementing environmental standards, the County has provided notice to the Tribe as a "consulted agency" on all land use questions with potential environmental implications for the Reservation. (Tr. 494-495.)[5]

Those aggrieved by County land use decisions have a right to an administrative appeal and judicial review. (*See* Ex. 212, Section 15.13.090, TR. 344.)

The record shows the County's history of regulating deeded land on the Reservation. For example, since 1965, the County has processed 148 short plats for land on the Reservation, and has processed fourteen long plats on such land since 1970. (Tr. 455 & 457.) In fact, the evidence shows that the Tribe submitted for County processing a long plat application for some of the Tribe's Reservation land. (Tr. 455.) Since 1972, the County has issued 780 building permits for on-Reservation construction, and since 1974, it has processed 44 special use permit files, nineteen variances, and eleven rezoning applications concerning fee land within the Reservation. (Tr. 498, 538.)

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[5] Under the regulations implementing Washington's Environmental Policy Act, the agency with the main responsibility for performing environmental review of a proposal is to consult other agencies with jurisdiction *or* expertise in a given matter for assistance. Such an assisting agency is a "consulted agency" under State law. *See* WAC 197-11-724. *See also* WAC 197-11-500(2) (authorizing lead agency contact with a consulted agency).

2. *Tribal Regulation*

The Tribe also asserts land use jurisdiction over the Reservation but, in contrast to the County (which does not zone Tribal trust land), asserts that authority over all land, whether or not owned by the Tribe. (Tr. 117, 188; Ex. 6, Tr. 28, Jt. App. 38.) In 1970, the Tribe adopted its first zoning ordinance, which was modeled on Yakima County's then existing code. (W. Pet. 40a.) In 1972, the Tribe adopted its currently effective Amended Zoning Ordinance. (W. Pet. 41a.) This ordinance is patterned after the County's earlier adopted 1972 Code. (Tr. 193-194.) The Tribe's code contains one zone—"agricultural"—for farm land, which requires a minimum lot size of five acres. (W. Pet. 42a; Jt. App. 56-59.) As applied in the open area, the Tribal Code, in harmony with the County code, has as its primary purpose the preservation of agricultural land. (W. Pet. 92a-93a; Jt. App. 39.)

Applications under the Tribe's ordinance are handled by a zoning administrator and a Board of Adjustment comprised of Tribal Council members. (Tr. 115, 185; Jt. App. 47, 49-54.) There is no right to direct judicial review—either in Tribal, state or federal court—of Tribal zoning decisions. (Tr. 158-159; Br.Tr. 184.) The Tribe's code leaves no room for doubt on this matter; it equates judicial review with sovereign immunity. Section 10 of the Tribal ordinance, which addresses an aggrieved party's access to judicial review of land use decisions, reads in its entirety:

> APPEAL FROM THE BOARD OF ADJUSTMENT
>
> Nothing in this ordinance shall be construed to be a waiver of sovereign immunity by the Yakima Indian Nation, and its officers and agents.

(Jt. App. 54.) Despite this lack of judicial review, the Tribe's zoning ordinance also provides that non-complying owners of fee land can be expelled from the Reservation:

> All uses of property not in conformity with this resolution shall be enjoined and in extreme cases the violators excluded from the Yakima Indian Reservation.

(Jt. App. 56.)

The Tribe has issued a zoning map showing its regulatory scheme. According to its ordinance, that map is an integral part of the Tribe's zoning code (Jt. App. 39-41) but, as a then member of the Tribal Council admitted at trial, a landowner cannot discern from reading that map how his property is zoned. Rather, one must visit the Tribal zoning administrator to secure that information. (Tr. 200-201. *See also* Tr. 454-455.)

The Tribe does not have a subdivision ordinance. In fact, up to the time of trial the Tribe, on an *ad hoc* basis, had approved every sub-division request that had come before it. (Tr. 453, 198, 171.) The Tribe has no formal environmental review process relevant to land use decisions. (Tr. 198-199.) The Tribe allows building in flood plains, and does not participate in the federal flood insurance program. (Tr. 205-206, 497.)

The record shows the Tribe's history of administering its zoning code in the open area. Since 1972, it has processed 883 land use applications and 75 variances. Three hundred and seventeen of these applications were submitted by nonmembers of the Tribe and concerned deeded land. (Tr. 118.)

In applying its ordinance to the open area, the Tribe is on record as thus far *choosing* not to exercise the power it claims over the incorporated municipalities of Harrah, Wapato, and Toppenish. (Tr. 163-164, 195-196. *But see* Ex. 8, Tr. 28, 195-196—the Tribe's Comprehensive Plan shows Tribal zoning of these cities.) As a Tribal Council member testified before the District Court:

> The Tribe *up to now* has not *opted* to actively pursue zoning and regulatory authority within city limits on the reservation for towns like Wapato and Toppenish.

(Tr. 117, emphasis added.) (*Cf.* Tr. 147-148—the Tribe asserts a similar unilateral power over certain water sources.)

Along with its zoning ordinance, the Tribe has pursued its land use efforts within the Reservation through repurchasing deeded, fee patent land and converting it back into Tribal trust status. (Tr. 109-110. *See also* Tr. 317.) The Tribe has expended about $54 million on this effort. (Tr. 110.)

E. Wilkinson's Property And The Decisions Below

Stanley Wilkinson is a non-Indian. He resides on the Reservation and owns in excess of 100 acres in Yakima County on the Reservation in the open area. (Tr. 519.) His fee ownership derives from the federal allotment policy of the late nineteenth century. (*See generally* Ex. 248.) The present dispute involves a portion of Wilkinson's 100 Reservation acres. As the District Court described it, the land central to *Whiteside II* is a

> 40 acre tract of fee land in the extreme north-east corner of the Reservation. The land is approximately three-quarters of a mile south of the Reservation's northern boundary. The parcel is situated on the northern slope of Ahtanum Ridge, overlooking the Yakima Municipal Airport (1½ miles to the north) and the City of Yakima (3 miles to the north). Wilkinson's property is bordered to the north by trust land and to the east, south and west by fee land. Currently, the property is vacant sagebrush land.

(W. Pet. 47a-48a (footnote omitted). *See also* W. Pet. 51a.)

Wilkinson's land is separated from the vast majority of the Reservation by Ahtanum Ridge, which rises to over six hundred feet directly south of his land. (Jt. App. 79.) On the geographically distinct north side of Ahtanum Ridge, Wilkinson is one of about 484 residents, 10% of whom are Indian. (Tr. 499-500.) Wilkinson owns an orchard. (Tr. 177). It, as well as several residences, is located near to that portion of Wilkinson's property he wishes to develop. (Tr. 177, 179, 231-232, 521.) There is an Indian cemetery 1.5 miles from Wilkinson's land. (Tr. 342.)

As part of its regulation of all fee land in Yakima County, the County zoned Wilkinson's land. (W. Pet. 44a.) So did the Tribe. (Tr. 117.) These designations conflict. The County zoned Wilkinson's land "General Rural," the Tribe "Agricultural." (W. Pet. 42a, 44a.)

In 1983, Wilkinson applied for and obtained the County's preliminary approval to subdivide a portion of the forty-acre tract in question, which he desired to convey to Messrs. Gatliff and Keller. (W. Pet. 34a, 47a-48a.) He wished to subdivide 32 of those 40 acres into 20 residential lots ranging in size from 1.1 to 4.5 acres. (W. Pet. 48a.) The Tribe's ordinance, which proscribed lots of less than five acres on the Wilkinson property, prohibited this subdivision absent a variance. (Tr. 117.)

The Tribe filed a timely appeal of the County's decision to the County Board of Commissioners, and urged that the County did not have jurisdiction over Wilkinson's land. After a hearing, the Board of Commissioners asserted jurisdiction and approved Wilkinson's proposed land use. (W. Pet. 49a-50a.)

In response, the Tribe, pursuant to 28 U.S.C. §§ 1343 and 1362, commenced this litigation (*"Whiteside II"*) in the United States District Court for the Eastern District of Washington on October 28, 1983. (Jt. App. 26.) The Tribe joined as defendants Yakima County, the Yakima County Commissioners (Jim Whiteside, Graham Tollefson and Charles Klarich), the Director of Yakima County's Planning Department (Richard Ander-

wald), Stanley Wilkinson, and Jim Gatliff and Dick Keller, the prospective purchasers of Wilkinson's land. (Jt. App. 28.) Along with other relief under 42 U.S.C. § 1983 and Washington's Environmental Policy Act, the Tribe sought "a declaratory judgment declaring the rights of the parties regarding land-use and entry regulations within the exterior boundaries of the Yakima Indian Reservation . . ." (Jt. App. 35.)

At the same time it was pursuing this action concerning its authority over open area land, the Tribe was also seeking a declaration of its regulatory power over all land within the closed area of the Reservation. On September 12, 1983, it had filed the federal court action of *Yakima Indian Nation v. Whiteside* ("*Whiteside I*"). (Jt. App. 13.)[6] That case concerned whether the Tribe had authority to preclude petitioner Brendale's proposed development of his 160 acre tract of closed area fee land. (Jt. App. 15-16; W. Pet. 123a-124a.)

In *Whiteside II*, after a trial on the merits, the District Court rejected the Tribe's claim to "paramount and exclusive" (W. Pet. 35a) land use jurisdiction over Wilkinson's property. It so ruled on the basis of this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). In reaching its judgment that the Tribe was "without the authority to exercise regulatory jurisdiction over Wilkinson's 'Open Area' fee land" (W. Pet. 67a), the District Court made the following crucial findings of fact that remain undisturbed after the Ninth Circuit's review: First, it found that Yakima County's zoning scheme is more protective of open area agricultural land than is the Tribe's zoning ordinance.[7] Second,

[6] Wilkinson attempted unsuccessfully to intervene in *Whiteside I*. (Jt. App. 1, District Court Docket Entries 58 & 83.)

[7] A good deal of the testimony at trial was dedicated to this issue. The conflict in the testimony was centered upon whether the County's ordinance, which in its "exclusive agriculture" and "general agriculture" zones require respectively 40 and 20 acre lot sizes, was more protective of agriculture than the Tribe's single agricultural zone classification mandating a minimum lot size of five acres. (W. Pet. 42a, 44a-46a, 53a; Tr. 51, 54, 467, 473-474, 489.) Although in this particular instance the Tribe's five-acre requirement for Wilkinson's property initially appeared more restrictive than did the County's "General Rural" designation reqiuring only one acre lots, the evidence indicated the contrary. The testimony of Tribal Council members clarified that the Tribal zoning scheme created no bar to the subdivision of *all* Reservation agricultural land into five acre plots, and that the Tribe had even granted variances for plots of less than five acres. (Tr. 171, 210.) Also, the *Tribe's* expert testified on direct examination that the Tribe's five acre agricultural lot size did not appear to be a good size to protect agriculture. (Tr. 54.) Indeed, he also opined that the only thing preventing wholesale subdivision of all Reservation land into agriculturally inviable five acre plots was *State* law. (Tr. 72-74.) The Court apparently credited this testimony, and the testimony of the County's land use expert (Tr. 460-490), in reaching its finding of fact on this issue.

it found that the Tribal land near Wilkinson's property was not a significant source of food for Tribal members, and therefore that Wilkinson's proposed land use did not threaten a Tribal food source. Third, it found, in light of the Tribe's reliance on its closed area timber income, that the Wilkinson project did not threaten the Tribe's economic security. (W. Pet. 53a, Findings of Fact 9-11.)

The District Court also found that the County's regulation of Wilkinson's fee land would not hinder the Tribe from exercising its power over trust land, and thus that the Tribe's political integrity was not endangered. (W. Pet. 54a, Finding of Fact 14.) In its oral opinion the District Court stated unequivocally:

> I find that there is *no evidence whatsoever* presented in this case to be the basis for a finding that the exercise by Yakima County of its zoning jurisdiction over the deeded land in the Open Area would interfere with the political integrity, economic security, or health or welfare of the Tribe.

(W. Pet. 99a, emphasis added.)

The record upon which these findings were based reflects an important, recurring theme of the Tribe's presentation. During the trial of *Whiteside* II, the Tribe's witnesses, in asserting the need for exclusive Tribal zoning authority, returned repeatedly to the perceived necessity of reversing the effects of the federal allotment policy. Thus, for example, Tribal Council member Washines spoke of the importance of the Tribe's commitment to the repurchase of fee patent land. (Tr. 109-110.) Elmer Schuster, a Tribal member owning land contiguous to Wilkinson's, testified as to the traditional value of land within the Reservation by stating his family's long-standing opposition to the allotment process. (Tr. 301.) Similarly, Rudy Saluskin, another Tribal member holding an interest in land near to Wilkinson's, recounted and endorsed the opinion held by his father that the allotment process was harmful to the Tribe because it allowed non-members to establish a presence on the Reservation. (Tr. 318. *See also* Tr. 109-110, 317 (Tribal land repurchase program designed to acquire deeded land and return it to Tribal trust status).)

The District Court was very sensitive to these considerations. On no less than three occasions during the course of his oral decision the District Court noted these concerns sympathetically:

> In utilizing the *Montana* standards, I am not unmoved by the desire of the Tribe and the Members thereof to have its treaty lands returned to it, but that does not, in my opinion, justify my finding that such a desire constitutes a threat to the political integrity, the economic security, or the health or welfare of the Tribe and its Members. (W. Pet. 96a.)
>
> * * * *
>
> I am unable to find that the desire, the sincere desire of the Tribe and its Members to have the deeded land restored to it is such as interferes with the political integrity, the economic security, or the

> health or welfare of the Tribe and its Members. Once again, that is a matter for the Legislative Branch, not the Judicial Branch to determine. (W. Pet. 98a.)
>
> * * * *
>
> I suggest to the Yakima Indian Nation that despite your sincere belief that all of the land within the exterior boundaries should be returned in accordance with the Treaty of 1855, that that may be some time in coming. I think you recognize that that is a matter for the Legislative Branch of this Government to decide; to-wit, Congress. (W. Pet. 101a.) (*See also* W. Pet. 12, n.7.)

Notwithstanding these sincere concerns, the Court felt constrained to reach its decision in light of the controlling legal considerations: Congressional enactment and implementation of the Allotment Act, and the current pattern of land ownership on the Reservation. It stated that the allotment policy had modified the Treaty With The Yakima, and that this modification "is not a matter that I have the power to rectify. That is a matter for congressional enactment, for the Legislative Branch to rectify if they determine that appropriate action should be taken." (W. Pet. 89a-90a.) Of the non-Indian homesteading that resulted from the allotment policy, the Court stated "[t]hat is history; that happened" (W. Pet. 90a), and soon thereafter the Court pointed to a map (Ex. 200, Jt. App. 79), illustrating the checkerboard pattern of fee and Tribal trust land tenure on the Reservation, and stated that it "reflects exactly the history of the dealings by the United States' Government with the Indian people . . . ." (W. Pet. 91a.)

The District Court reached a different result in *Whiteside I*. The Court determined that the closed area case was factually "strikingly distinct" from Wilkinson's open area matter. (W. Pet. 81a.) It held that the Tribe had exclusive authority to regulate the use of Brendale's closed area fee land. (W. Pet. 108a, 159a.)

The Ninth Circuit Court of Appeals affirmed *Whiteside I* but reversed *Whiteside II*. As to Wilkinson's case, that Court conceived the relevant analysis to consist of a two-step process. First, relying on *Montana v. United States*, 450 U.S. 544 (1981), it assessed whether the Tribe possessed any authority to zone non-Indian fee land within the Reservation's borders. (W. Pet. 16a-24a.) Much as the Ninth Circuit Court of Appeals erroneously approached the Crow Tribe's authority in *United States v. Montana*, 604 F.2d 1162 (9th Cir. 1979), *rev'd*, 450 U.S. 544 (1981), the Ninth Circuit here ruled that the Yakima Tribe derived its sovereign power over all fee land within its Reservation from two sources: "implicitly from its status as a dependent sovereign" and "explicitly from the Treaty with the Yakimas." (W. Pet. 17a.) *Cf. Montana v. United States*, 450 U.S. 544, 557 (1981). Having concluded that the Tribe did possess such power, the Court remanded the case to allow the District Court to balance the interests of the Tribe and the County to determine which entity's concurrent authority over open area land would ultimately control in this case. (W. Pet. 24a-25a, 29a-31a.)[8]

In reversing *Whiteside II*, the Ninth Circuit did not hold that the federal policy of "recognizing Indian sovereignty and encouraging tribal self-government," (W. Pet. 15a) was preemptive of County regulatory authority over deeded land on the Reservation. (W. Pet. 14a-16a.) *Cf. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Further, it did not set aside the District Court's underlying findings of fact. *See supra* at 18-19.

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[8] This finding of concurrent jurisdiction parallels the scheme of dual authority the Ninth Circuit formulated, and this Court struck down, in *United States v. Montana*, 604 F.2d 1162, 1172 (9th Cir. 1979), *rev'd*, 450 U.S. 544 (1981). *Cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983) ("concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation").

Rather, under *Montana v. United States*, 450 U.S. 544 (1981), it held first that the Tribe possessed regulatory power over *its* lands (W. Pet. 21a), and then concluded that the extension of this authority over the deeded land of non-members was a necessary attribute of the Tribe's sovereignty:

> Further, a major goal of zoning is the "systematic and coordinated utilization of land" in a particular area. N. Williams, *American Land Planning Law*, § 1.06 (1974), *cited in* Comment, 53 Wash. L. Rev. at 679. Comprehensive planning enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses in a desirable pattern. *Id.* at § 1.08, *cited in* Comment, 53 Wash. L. Rev. at 685. Yakima Nation has exclusive authority to zone tribal trust land which constitutes nearly all of the closed area and over half of the open area. Although the fee land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checkerboard pattern. *If we were to deny Yakima Nation the right to regulate land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme. This we are unwilling to do.*

(W. Pet. 23a-24a, emphasis added.)

Following an unsuccessful motion for rehearing and rejection of a suggestion for rehearing en banc, Wilkinson, Brendale, and the County timely filed their petitions for certiorari, which this Court granted on June 20, 1988 and consolidated for review. (Jt. App. 8-10.)

SUMMARY OF ARGUMENT

The Tribe does not possess either inherent sovereign authority or a treaty right to regulate the use of fee land located within the Reservation but owned by non-members of the Tribe.

It does not retain the inherent sovereign authority to regulate non-member fee land because such power poses the potential for an intrusion into the property rights of non-members, who may neither participate in Tribal government nor secure direct judicial review of Tribal land use decisions. Further, the possession of this power is not necessary to the Tribe's political integrity, economic security or health and welfare. *See Montana v. United States*, 450 U.S. 544 (1981). Such a power is, therefore, necessarily inconsistent with the Tribe's status as a "limited sovereign" dependent upon the United States for its existence and powers. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

The Treaty With The Yakima cannot serve as a source of comprehensive Tribal land use authority because the federal policy of land allotment, most clearly embodied in the Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331, *et seq.*, and the evolving demographic characteristics of the Reservation, reveal Congress's intent to preclude Tribal regulatory jurisdiction over non-member fee land. *See Montana v. United States*, 450 U.S. 544 (1981). *Cf. Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (relying on demographic data to support a finding of Congressional intent to disestablish part of a reservation).

In ruling as it has, the Ninth Circuit improperly arrogated to itself the political power to override the intent of Congress's allotment policy and substitute for it the Court's view of the appropriate attributes of Tribal sovereignty. It did so while leaving undisturbed the District

Court's crucial underlying factual findings. The Court, therefore, transgressed both the controlling guidance this Court provided in *Montana v. United States*, and Federal Rule of Civil Procedure 52(a). *Cf. Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 546 (1985) (precluding the unelected federal judiciary from making political judgments about "which policies it favors").

If it is not to be reversed on the aforementioned grounds, the Ninth Circuit's decision must be reversed because of the impact it will have on the constitutional rights of non-members. The Ninth Circuit's decision recognized Tribal power over non-members, who cannot vote in Tribal elections nor obtain direct judicial review of Tribal land use decisions. If the Tribe does possess this authority, it must arise from a post-Allotment Act Congressional delegation. *Montana v. United States*, 450 U.S. at 564. The Constitution prohibits Congress from exercising such power directly. U.S. Const., Amend. V. Neither may it delegate that power to the Tribe. *Cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (finding state action for purposes of the Fourteenth Amendment).

ARGUMENT

I. NEITHER INHERENT TRIBAL SOVEREIGNTY NOR THE TREATY WITH THE YAKIMA SUPPORT THE YAKIMA INDIAN TRIBE'S CLAIM THAT IT POSSESSES THE POWER TO REGULATE THE USE OF FEE LAND WITHIN THE BOUNDARIES OF ITS RESERVATION WHEN THAT LAND HAS BEEN CONVEYED TO NON-MEMBERS OF THE TRIBE PURSUANT TO THE FEDERAL POLICY OF LAND ALLOTMENT.

A. The Yakima Tribe's Dependent Status Is Necessarily Inconsistent With Retention Of An Inherent Power To Control The Use Of Property Owned In Fee By Non-Members Of The Tribe.

1. *Tribal sovereignty entails only what is necessary for the Tribe to govern its members.*

Indian tribes do not possess the status of full sovereigns. *See* F. Cohen, *Handbook of Federal Indian Law* (1942) at 122.

In *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 561 (1832), Justice Marshall treated the Cherokee Tribe as a distinct nation in which the laws of the State of Georgia could have "no force." This Court has, however, "long ago departed from the 'conceptual clarity of Mr. Chief Justice Marshall's view in Worcester.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983), *quoting*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). *See also Williams v. Lee*, 358 U.S. 217, 219 (1959).

Indeed, despite Chief Justice Marshall's sweeping pronouncement in *Worcester*, this Court has recognized consistently from "the first Indian case to reach this Court," that since their incorporation into these United States "the Indian tribes have lost any 'right of governing every person within their limits except themselves.'" *Montana v. United States*, 450 U.S. 544, 565 (1981), *quoting*,

Fletcher v. Peck, 6 Cranch (10 U.S.) 87, 147 (1810) (Johnson, J., concurring). *See also United States v. Wheeler*, 435 U.S. 313, 323 (1978) (the Tribes's "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.") (Footnote omitted.)

Thus, the "sovereignty that the Indian tribes retain is of a unique and limited character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Indian tribes do not retain those otherwise traditional attributes of sovereignty that have been "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. at 323.

> Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978), *quoting*, *United States v. Kagama*, 118 U.S. 375, 379 (1886).

The implicit limits of Indian sovereignty take shape at the border "between an Indian tribe and nonmembers of the tribe." *United States v. Wheeler*, 435 U.S. at 326. It is at this point that the exercise of tribal authority creates the potential for subversion of what this Court has recognized as the federal government's "great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978).

Judicial vigilance in recognizing the limits of tribal authority over non-members is necessary. The preexisting, sovereign authority that Congress has not taken

from the tribes by treaty or statute is not subject to the constraints of either the Fourteenth Amendment or the Bill of Rights. *See Talton v. Mayes*, 163 U.S. 376 (1896). Tribes maintain their civil immunity from suit. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Those the Tribe regulates possess only a statutory entitlement to certain fundamental rights, and, with the exception of the remedy of habeas corpus, cannot judicially enforce those rights except in Tribal court. *Id.*; 25 U.S.C. §§ 1301-03 (1982). Most importantly, those non-members subject to Tribal power are denied the fundamental democratic safeguard of electoral redress, for they have no voice in selecting those exercising control over their affairs. It necessarily follows that

> The tribes' authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is consistent with the fundamental principle that "in this Nation each sovereign governs only with the consent of the governed." Nevada v. Hall, 440 U.S. 410, 426. Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 172-73 (1982) (Stevens, J., dissenting).

It was this backdrop that informed this Court's analysis in *Montana v. United States*, 450 U.S. 544 (1981). *Cf. McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973) (identifying concepts of Indian sovereignty as the backdrop to determining whether federal interests preempt state law).

In *Montana v. United States*, this Court rejected the Crow Tribe's contention that it retained the inherent sovereign authority to regulate hunting and fishing by non-members on their fee lands located within the Crow Reservation. 450 U.S. at 563-564. The private fee lands

in question constituted 28% of the reservation. *Id.* at 548. In explaining its conclusion, the Court identified several examples of the circumscribed self-governing authority that Indian tribes retain:

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Montana v. United States, 450 U.S. at 564.

In this Court's view, tribal regulation of non-member hunting and fishing on fee-owned lands within the reservation simply bore "no clear relationship to tribal self-government or internal relations." *Id.* (footnote omitted). The Court supported this result by reference to the undisturbed factual findings of the District Court that "the State of Montana has traditionally exercised 'near exclusive' jurisdiction over hunting and fishing on fee lands within the reservation, and that the parties to this case had accommodated themselves to the state regulation." *Id.* at 564, n.13. This Court also relied on the Tribe's failure to show that non-Indian hunting and fishing on the fee land threatened "the subsistence or welfare of the Tribe" or that the State had either abdicated or abused its responsibility for protecting and managing wildlife. *Id.* at 566 & 566 n.16.

In rendering its opinion, the *Montana* Court provided guidelines to be employed in assessing whether a given exercise of tribal authority over non-members should be upheld. The guideline both the Ninth Circuit and the District Court relied upon in resolving this case provides:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 566.

Wilkinson's case turns in part on the foregoing principles.

2. *Tribal authority over the fee land of non-members constitutes an impermissible intrusion into those non-members' civil rights.*

Tribal authority over Wilkinson's fee land undoubtedly creates the potential for an inappropriate intrusion into individual rights. *Cf. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (precluding tribal criminal jurisdiction over non-members). It is clear that zoning is a difficult and politically sensitive matter with serious implications. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. ——, 107 S. Ct. 2378 (1987) (zoning can effect a constitutionally cognizable taking). Thus, it is imperative that those holding the power to make land use decisions be democratically accountable to the people subject to their authority. This Court has long recognized the significant role the political process plays in validating land use controls. *See Village of Euclid v. Ambler Realty*, 272 U.S. 365, 389 & 393 (1926). *Cf. Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live.")

The Ninth Circuit's decision inappropriately creates the potential for significant in-roads into this constitutionally protected interest. The Ninth Circuit's ruling, in deference to *Montana v. United States*, implicitly acknowledges Wilkinson's right to hunt and fish on his land,

but simultaneously creates the possibility that he may be able to use his property for very little else. *Cf.* Tr. 75, 264 (indicating that the land Wilkinson sought to subdivide is not well-suited to agriculture). *See also* Brief of the State of Arizona, *et al.* in Support of Petitions for a Writ of Certiorari at 9. Moreover, the Tribe threatens landowners such as Wilkinson with expulsion from the Reservation—and eviction from their property—if the Tribe views a given land use as "extreme" non-conformance with its code. (Jt. App. 56.)

The Ninth Circuit upheld this Tribal authority under a regime in which Wilkinson is unable either to call the Tribe to account through the electoral process or secure direct judicial review of Tribal land use decisions. (Tr. 169, 158-159; Jt. App. 54; Br. Tr. 184; *supra* at 12, 14-15.) The Ninth Circuit has thus imposed on Wilkinson a second-class citizenship despite his residence within the borders of these United States.

This is the very type of intrusion into the constitutional rights of an American citizen residing within this country that *Oliphant* and *Montana* stress should not be countenanced.

3. *Regulatory authority over non-member fee land is not necessary to the Tribe's political integrity, economic security or health and welfare.*

The District Court characterized the record in *Whiteside II* as providing "no evidence whatsoever" supporting the contention that curtailing Tribal authority in the open area would in any way threaten the Tribe's economic security, political integrity or health and welfare. (W. Pet. 99a.) It thus determined that the Tribe did not possess such authority. (W. Pet. 78a.) This conclusion comports exactly with this Court's view in *Montana v. United States* that absent the *need* for tribal regulation of non-members, no such Tribal power exists. *Montana v. United States*, 450 U.S. at 566.

Essential to this Court's holding in *Montana v. United States* was that the Crow Tribe had not shown regulation of non-members to be critical to the welfare of the tribe. The tribe maintained its security without that asserted power: the reservation remained "livable," the non-member hunting and fishing the tribe sought to regulate did not imperil the tribe's subsistence, and the State had in no fashion "abdicated or abused" its regulatory responsibility. *See Montana v. United States*, 450 U.S. at 566 & ns. 15 & 16. *Cf. Winters v. United States*, 207 U.S. 564 (1908) (recognizing a tribe's retained rights to enough river water to make its reservation livable); *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900, 903 (10th Cir. 1982) (recognizing tribal land use authority over the fee land of non-members in the "absence of any [state] land use control over lands within the Reservation").

The facts of *Whiteside II* show that these criteria foreclose the Tribe's claim to authority over the use of Wilkinson's fee land. The Tribe earns 90% of its income from timber operations in the closed area. To the extent either the Tribe or its members derive income from agriculture in the open area, the District Court determined that the County's code was more protective of that income source than the Tribe's ordinance. (Tr. 122-123; W. Pet. 53a.)

Similarly, the record reflects that the Yakimas are not dependent on a food source that is endangered by County regulation in Wilkinson's case. (W. Pet. 53a.) *Cf. Montana v. United States*, 450 U.S. at 566 (relying on the Crow Tribe's lack of dependence on the wildlife resources the Tribe sought to regulate).

Moreover, rather than abdicating its responsibility, the County has exercised zoning jurisdiction over the open area for the last thirty-five years, a period substantially coextensive with the time during which Yakima County has exercised *any* land use regulation. (W. Pet. 85a,

43a.) (Indeed, prior to this litigation the Tribe has on at least one occasion requested the County approve the use of some of the *Tribe's* Reservation land. (Tr. 455.))

As the facts described indicate, the Tribe's security is not imperiled by the activity it seeks to regulate, and the County of Yakima is actively fulfilling its responsibility to exercise its regulatory power effectively and helpfully. In disregarding these facts the Ninth Circuit has recast the concept of Indian sovereignty in derogation of this Court's decisions, and should be reversed on the basis of *Montana v. United States.*

B. The Federal Policy Of Land Allotment Has Divested The Yakima Tribe Of Any Treaty Right To Regulate The Use Of Non-Member Fee Land Within Its Reservation.

If history had stood still since 1859, the Tribe's former treaty right to exclude non-members from their Reservation might have served to bar non-Indian settlement on the Reservation. *See* W. Pet. 178a. *But see supra* at 6, n. 2 (discussing the Treaty's provision for the federal sale of abandoned allotments). Similarly, if non-members had settled on the Reservation without Congressional authorization, that former Treaty right might now serve as authority for Tribal regulation of non-members' use of fee land. History, however, has not stood still. Congressional action, and the irresistible historical forces that accompanied it, necessarily preclude the Treaty from having this effect today.

This Court has dealt previously with the modern implications of a treaty provision stating, as does Article II of the Treaty With The Yakima, that a reservation was to be "set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit" of the Tribe, and that no white man could reside on the reservation absent Tribal and federal approval. *Compare* Article II of the Treaty of Medicine Creek, 10 Stat. 1132

(1855), *discussed in Puyallup Tribe, Inc. v. Department Of Game Of The State Of Washington*, 433 U.S. 165, 174 (1977), *with*, Article II of the Treaty With The Yakima, W. Pet. 178a. This Court has stressed that the implications of such a provision cannot be divorced from historical fact. *Puyallup Tribe, Inc. v. Department Of Game Of The State of Washington*, 433 U.S. at 174. Rather, "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana v. United States*, 450 U.S. at 561. Abstract reliance on the treaty language of "exclusive use and benefit" can provide "no support" for broad jurisdictional assertions. *Id.*

The history relevant to the interpretation and application of the Treaty With The Yakima is embodied in the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.* ("Allotment Act") (W. Pet. 194a-214a), and the evolving demographic characteristics of the Reservation.

1. *The Allotment Act divested the Tribe of power over non-member owners of fee land.*

It was through implementation of the Allotment Act that the fee land central to this litigation was removed from Tribal trust status and eventually passed into non-Indian ownership. *See generally*, Ex. 248. As discussed below, this Court has clarified beyond all question that Congress passed the Allotment Act intending to divest the tribes of power over the non-member fee holders of allotted land.

The federal allotment policy had as its purpose the assimilation of Indians into the fabric of American society through the "'gradual extinction of Indian reservations and Indian titles.'" *Montana v. United States*, 450 U.S. at 559, n.9, *quoting*, *Draper v. United States*, 164 U.S. 240, 246 (1896). When Congress invited non-Indians to settle on reservations pursuant to this policy,

it clearly intended that those non-Indians would not do so at the expense of subjecting their civil liberties to the authority of an absolute, alien sovereign:

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. . . . *It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.* And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if feeholders could be excluded from fishing or hunting on their acquired property.
>
> The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, at 25 U.S.C. § 461 et seq. *But what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian Treaty rights tied to Indian use and occupation of reservation land.*

450 U.S. at 559, n.9 (emphasis added).

Although federal policy has fluctuated, and allotments are no longer made, the Allotment Act remains unrepealed and the legal consequences flowing from that Act for fee holders are of controlling significance. *See, e.g., Montana v. United States*, 450 U.S. at 557-561.[9] Those

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[9] This comports with the Court's repeatedly emphasized observation that the character and source of land tenure should have enduring implications for the exercise of tribal and state regulatory authority. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-331 (1983) (distinguishing *Montana v. United States*, on the basis that *Montana v. United States* "concerned lands located within the reservation but *not* owned by the Tribe or its members").

consequences are that non-member owners of fee land within a reservation are, pursuant to Congressional intent, *not* subject to tribal land use regulation. *See Montana v. United States*, 450 U.S. at 558-561.[10] Once implemented, the allotment policy intentionally generated federally-based expectations of freedom from tribal authority that cannot be judicially extinguished. *Id.*[11]

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[10] Even one of the recent Congressional enactments that the Tribe relied on below confirms the continuing importance of the distinction between fee and trust land on a reservation. *See, e.g.*, 25 U.S.C. § 450 *et seq.* (1982 and Supp. III 1985), which, in the Ninth Circuit's words in this case, "authorizes the Secretary of the Interior, upon a tribe's request, to enter into a contract with the tribe, to reallocate management of land use programs involving *trust land, including zoning*, from the federal government to the tribe." (W. Pet. 15a, emphasis added.)

[11] The Yakima Land Purchase Act, c. 423, 69 Stat. 392, as amended, 25 U.S.C. § 608(a)(1), and the Tribe's expenditure, with federal approval, of $54 million to reacquire fee land, provide a specific illustration that Congress has not attempted to repudiate the implications for individuals of land ownership arising from the allotment process. The Act provides for the Secretary of the Interior to

> purchase for the Yakima Tribes, with any funds of such tribes, and to otherwise acquire by gift, exchange, or relinquishment, any lands or interest in lands or improvements thereon within the Yakima Indian Reservation or within the area ceded to the United States by the treaty of June 9, 1855
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> . . .

In this manner, Congress showed its intent that Tribal control over fee land should be accomplished by the land's repurchase and resumption of trust status. *See* Letter, dated May 3, 1955, of F.G. Aandahl, Assistant Secretary of the Interior, to James E. Murray, Chairman, Committee on Indian and Insular Affairs, United States Senate (land repurchase would lead to "the eventual assumption by these Indian people of the management of their own affairs"), written in support of S. 1603, *reprinted in* S. Rpt. No. 847, 84th Cong., 1st Sess. *See also* Tr. 110 (Tribal Council Member Washines discussing the Tribe's expenditure of $54 million to reacquire fee land and return it to trust status). *Cf.* Tr. 317 (Tribal member Saluskin discussing the importance of a provision for the Tribe's

2. *The Reservation's demographic characteristics illustrate Congress's intent to displace tribal authority over allotted, non-member fee land.*

Congress's intent to free non-member fee holders from tribal jurisdiction over land use is further evidenced by the demographic characteristics of the open area. This Court has recognized in the analogous context of Congressional diminishment of reservations that the "subsequent demographic history of opened lands" may serve as a "clue", albeit an imperfect one, "to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Solem v. Bartlett*, 465 U.S. 463, 471-472 & n.13 (1984) (footnote omitted). *See also Id.*, at 471 ("On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the open portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603-605 (1977); *DeCoteau v. District County Court For The Tenth Judicial District*, 420 U.S. 425, 442-443 (1975).

In this case, the District Court explicitly recognized the importance of these considerations when he stated, referring to a BIA map of the Reservation showing the pattern of land ownership, that

> Exhibit No. 200 reflects exactly the history of the dealings by the United States' Government with the Indian People, the result being the factual situation with which I must deal; to-wit, a substantial portion of the Open Area of the Yakima Indian Nation being held in fee rather than being held in trust for the

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reacquisition of land.) Simply put, the Tribe inappropriately seeks to obtain through regulation a power over land Congress intended for it to possess only through repurchase.

benefit of the peoples of the Yakima Indian Nation as was intended in the Treaty of 1855.

(W. Pet. 91a-92a; Ex. 200, Jt. App. 79.) This observation is clearly supported by the evidence of record: almost one-half the acreage in the open area is held in fee by non-members, while non-members comprise 80% of that region's population (W. Pet. 40a, 51a); non-members farm 130,645 of the open area's 143,000 irrigated acres; (Tr. 422 & 418); there are three incorporated municipalities with a combined population of over 10,000 in the open area (W. Pet. 51a); and, the County has exercised land use jurisdiction over this area for thirty-five years (W. Pet. 85a.). The record shows that these statistics are the direct result of the allotment policy. (Ex. 248.)

In *Rosebud Sioux Tribe v. Kneip*, analogous facts proved adequate to confirm Congress's intent to *disestablish* a portion of an Indian reservation: "The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges." 430 U.S. at 604-605 (footnote omitted). *See also Solem v. Bartlett*, 465 U.S. at 479-480. The demographics of the open area, read in light of the unmistakable intent of the Allotment Act, mandate the conclusion that Wilkinson's fee land is not subject to the Tribe's land use regulation.

3. *The Ninth Circuit's decision ignores the allotment policy and turns on inappropriately political considerations.*

At the core of the Ninth Circuit's decision is a troubling willingness to engage in a revisionist exercise. The Ninth Circuit ignored the factual predicates of the District Court's analysis, Congress's intent in its allotment

policy, and this Court's reading of that Congressional intent, in reaching its determination that comprehensive zoning authority was a necessary attribute of the Tribe's authority. The Ninth Circuit's decision reflects its assessment that history and Congress's intent should yield to the Ninth Circuit's judgment that checkerboard Tribe-County zoning jurisdiction is inappropriate. (W. Pet. 23a-24a.) That, however, is a *political* question. *Cf. Luther v. Borden*, 7 How. (48 U.S.) 1 (1849) (the Constitutional guaranty, in Art. IV, § 4, of a republican form of government poses a political question).

The Ninth Circuit's approach is reminiscent of the "unsound" and "unworkable" judicial assessments of State sovereignty jettisoned in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 546 (1985). To paraphrase *Garcia* and analogize it to this case, *Montana v. United States* is not properly viewed as an invitation to "an unelected federal judiciary to make decisions about which . . . policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. at 546. If uncorrected, the Ninth Circuit's approach will transform *Montana v. United States* into a vehicle for the expression of overtly political judgments that are properly within the domain of Congress.

The record below shows that checkerboard jurisdiction over land use is commonplace. (Tr. 469-471; Ex. 246, Tr. 470, 471. *Cf.* Br. Tr. 491—the County regulates the fee land contained within the boundaries of federal enclaves, such as the national forest, within Yakima County.) Further, the District Court determined, contrary to the Tribe's theoretical objections, that such a scheme is oftentimes necessitated by modern conditions and is neither impossible nor difficult to administer. (W. Pet. 97a.)

The impermissibly political character of the Ninth Circuit's decision to disregard these observations is evidenced

by this Court's holding that the checkerboard pattern of jurisdiction on the Yakima Reservation is legally unobjectionable. This Court has stated in regard to the very Reservation here in question that "classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States." *Washington v. Confederated Bands And Tribes Of The Yakima Indian Nation*, 439 U.S. 463, 501 (1979).[12]

In essence, the Ninth Circuit embraced the Tribe's invitation to turn back the legacy of the allotment policy. (Tr. 301, 318.) The Ninth Circuit did what the District Court properly refrained from doing. (W. Pet. 96a, 98a, 101a; *supra* at 20-21.) Such a decision is not one for the Ninth Circuit to make. Congress has spoken. Many of Yakima County's citizens have accepted Congress's invitation. As this Court has stated, "[s]ome might wish [Congress] had spoken differently, but we cannot remake history." *DeCoteau v. District County Court For The Tenth Judicial District*, 420 U.S. at 449.[13]

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[12] Neither *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), nor *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) are to the contrary. Those cases establish that Congress did not envision a scheme of checkerboard jurisdiction over *tribal members* based *solely* upon the character of land tenure within a reservation. The later case of *Montana v. United States*, demonstrates that neither *Moe* nor *Seymour* speak to the question of the efficacy of a system of checkerboard jurisdiction implicating the rights of *non-members* of a tribe. Rather, *Montana v. United States, requires* the approval of such a jurisdictional structure if the non-members own reservation fee land pursuant to the federal allotment policy. Indeed, *Moe* allowed the State of Montana to require a *tribal member* to collect a state tax on a transaction occurring within the reservation when the transaction was the Indian sale of cigarettes to non-members of the Tribe. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservations*, 425 U.S. at 481-483.

[13] *Cf. United States v. Sioux Nation of Indians*, 448 U.S. 371, 437 (1980) (Rehnquist, J., dissenting) ("[t]hat there was tragedy,

C. The Ninth Circuit Proceeded Improperly Under Federal Rule Of Civil Procedure 52(a) When It Independently Redetermined Whether The Tribe Possessed Authority Over The Use Of Non-Member Fee Land Within The Reservation.

In reaching its conclusion in *Whiteside II*, the District Court found:

> 9. In part due to the parcel size requirements of the county's "exclusive" and "general" agriculture zones, *i.e.*, 40 and 20 acres respectively, the Yakima County zoning scheme is more protective of the Open Area's agricultural lands than the Yakima Nation's "agricultural" use district which allows agricultural land to be divided into 5-acre lots.
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> 10. The trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Yakima Nation. The proposed Wilkinson development does not threaten a food source of members of the Yakima Nation.
>
> 11. Similarly, the Wilkinson project does not threaten the economic security of the Yakima Nation. The plaintiff has not demonstrated how Yakima County's regulation of the land use of Wilkinson's "Open Area" property in any way places its economic security in jeopardy.

(W. Pet. 53a.)

The Ninth Circuit acknowledged that the District Court's findings were subject only to the deferential scrutiny authorized by Fed. R. Civ. P. 52(a) (W. Pet. 25a), which provides that such findings "shall not bet set aside unless clearly erroneous." Fed. R. Civ. P. 52(a). It then

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deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied. But in a Court opinion, as a historical and not a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: 'Judge not, that ye be not judged' ").

reached its decision that the Tribe possessed regulatory authority over Wilkinson's land while leaving undisturbed these findings of fact.

This Court has been clear that Rule 52(a) "means what is says." *Bose Corporation v. Consumers Union Of United States, Inc.*, 466 U.S. 485, 498 (1984).

The rule did not deter the Ninth Circuit. Despite the District Court's findings, the Ninth Circuit simply "would have decided the case differently." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573 (1985). In disregard of the facts, it believed, on the basis of an overtly political assessment of the nature of "sovereignty," that the Tribe was threatened if it did not have power over land neither it nor its members owned. By so ruling the Ninth Circuit violated the command of Rule 52(a), and therefore should be reversed.

II. THE NINTH CIRCUIT'S DECISION SHOULD BE REVERSED BECAUSE IT SANCTIONS A DELEGATION OF UNCONSTITUTIONAL AUTHORITY OVER NON-MEMBERS OF THE TRIBE.

Given the foregoing, the Ninth Circuit's decision can only be affirmed on the basis of a Congressional delegation to the Tribe of authority over the constitutionally protected interests of non-members, when that Tribal authority is immune from both legislative redress and direct judicial review.

This Court has twice noted, but has thus far not addressed squarely, the question of whether the federal government may, in light of the constraints of the Fifth Amendment to the United States Constitution, delegate to an Indian Tribe power over American citizens that Congress would be constitutionally prohibited from assuming directly. *See United States v. Wheeler*, 435 U.S. 313, 328 n.28 (1978); *United States v. Mazurie*, 419 U.S. 544, 558 n.12 (1975) ("[w]hether and to what extent the Fifth Amendment would be available to correct arbitrary or discriminatory tribal exercise of its delegated federal authority must therefore await decision in a case in which the issue is squarely presented and appropriately briefed"). If this Court determines that the Federal Government's post-Allotment Act "policy of encouraging tribal self-government", *Iowa Mutual Insurance Company v. La Plante*, 480 U.S. 9, 107 S. Ct. 971, 975 (1987), has reposited in the Tribe the power it seeks here, it has made resolution of that question inevitable.

The authority the Tribe claims in regard to Wilkinson's property is one that concerns him "upon individual grounds," *Bi-Metallic Company v. Colorado*, 239 U.S. 441, 446 (1915), and touches a protectable property interest. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. ——, 107 S. Ct. 2378 (1987). Thus, Wilkinson's due process rights are implicated. *See, e.g., Londoner v. Denver*, 210 U.S. 373 (1908). Of even more fundamental importance, Wilkinson has a constitutional entitlement to participate in selecting those exercising governmental power over his property. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). *Cf. Village of Euclid v. Ambler Realty*, 272 U.S. 365, 389, 393 (1926) (the electoral process legitimizes governmental land use controls).

Congress may not exercise its authority to the detriment of either of these Constitutional safeguards. U.S. Const., Amend. V. Nor may it elude these constraints through delegation. *Cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (finding state action for Fourteenth Amendment purposes).

Under the Ninth Circuit's decision, however, Congress has necessarily transgressed these prohibitions.

First, Wilkinson's constitutional rights are imperiled. Wilkinson's property is subject to comprehensive Tribal regulation yet he cannot participate in Tribal elections. Thus, he is denied the fundamental right to participate in

the government whose laws he must obey. *Wesberry v. Sanders*, 376 U.S. at 17. Further, the Tribe precludes all direct judicial review of its land use decisions, (Br. Tr. 184), and expressly asserts immunity from suit. (Jt. App. 54). Therefore, he cannot secure adequate judicial review of Tribal zoning determinations. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 (9th Cir. 1980); *R.J. Williams Company v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985). *But see Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981) (providing a federal court remedy for a non-Indian denied access to tribal court).

Second, this situation could only come to pass pursuant to Congress's will. *All* aspects of tribal sovereignty are "subject to plenary federal control and definition." *Three Affiliated Tribes Of The Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 106 S. Ct. 2305, 2313 (1986). *See also National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845, 857 (1985) (the existence of tribal court jurisdiction presents a federal question within the scope of 28 U.S.C. § 1331); *Montana v. United States*, 450 U.S. at 564 (tribes possess power inconsistent with their dependent status only with "express congressional delegation").

The Fifth Amendment necessarily precludes such a delegation; for this reason the Ninth Circuit's decision cannot be sustained.[14]

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[14] Reversal of the Ninth Circuit's decision on the basis of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *Montana v. United States*, 450 U.S. 544 (1981) would simultaneously clarify this area of the law and avoid resolving this difficult and unnecessary constitutional question. *Cf. Lyng v. Northwest Indian Cemetery Protective Association*, 108 S. Ct. 1319, 1323-1324 (1988) (advising resolution of a controversy without needlessly confronting a Constitutional question), *citing, inter alia, Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). That is the course this Court should pursue.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded with directions to enter an order that the County of Yakima possesses exclusive authority to regulate the use of non-member fee land within the boundary of the Reservation. Alternatively, Wilkinson urges that insofar as the Court of Appeals reversed the District Court's judgment in *Whiteside II*, the Ninth Circuit's decision should be reversed, and the case remanded with directions to enter an order declaring that the County of Yakima possesses exclusive authority to regulate the use of non-member fee land within the open area of the Reservation.

Respectfully submitted,

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September 1, 1988

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Nos. 87-1622, 87-1697, 87-1711
CONSOLIDATED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
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COUNTY OF YAKIMA, *et al.*,
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CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF PETITIONERS COUNTY OF YAKIMA, *et al.*

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QUESTION PRESENTED

In light of *Montana v. U.S.*, 450 U.S. 544, does the Yakima Indian Nation have the authority to regulate through zoning the use of non-Indian owned fee lands located in an area of the reservation which is "open" to non-members of the Tribe and where Yakima County has exercised zoning authority over such lands for thirty-five years?

LIST OF PARTIES

Petitioners: The County of Yakima; Jim Whiteside, Graham Tollefson, and Charles Klarich, who are members of the Board of Yakima County Commissioners; Richard F. Anderwald, who is the Director of Yakima County's Planning Department; Stanley Wilkinson, a non-member of the Yakima Tribe who owns and resides on reservation land in Yakima County; and, Philip Brendale, a non-member of the Tribe who owns reservation land within Yakima County.

Respondent: The Confederated Tribes and Bands of the Yakima Indian Nation.

Jim Gatliff and Dick Keller, who at the time of trial were prospective purchasers of a portion of petitioner Wilkinson's reservation land, were aligned as defendants-appellees below and have filed a Notice of Appearance in this matter.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
TREATIES, STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	3
A. Introduction	3
B. The Wilkinson Proposal	5
C. The Open Area	9
D. Yakima County Land Use Regulation Within the Open Area	12
1. Comprehensive Plans	12
2. Zoning	13
3. Subdivisions	15
4. Shorelines	16
5. Federal Flood Insurance Program	16
6. State Environmental Policy Act (SEPA)	17
E. Tribal Zoning Regulations	17
F. Proceedings Below	19
SUMMARY OF ARGUMENT	23
ARGUMENT	24
I. Introduction	24

TABLE OF CONTENTS—Continued

	Page
II. The Federal Policy of Land Allotment has divested the Yakima Tribe of any treaty rights to regulate the use of non-member owned fee land within the open area of the reservation	25
III. The Yakima Indian Nation's inherent sovereign power does not generally extend to the activities of non-Indians on fee lands and will not sustain tribal land use jurisdiction over such lands	28
IV. Jurisdiction based on land tenure classification is neither irrational nor arbitrary and protects the interests of both Indians and non-Indians	33
CONCLUSION	37

TABLE OF AUTHORITIES

Cases	Page
Confederated Bands and Tribes of the Yakima Indian Nation v. Johnson, 40 Wn. App. 1032 (1985)	34
Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, et al., No. C-87-654-AAM	12
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)	35
Holly v. Totus, No. 85-4436 (9th Cir.), *cert. denied*, 98 L.Ed.2d 47 (1987)	36
Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9 (1987)	24, 30
Lawton v. Steele, 152 U.S. 133 (1894)	31
McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973)	27
Merrion v. Jicarilla, 455 U.S. 130 (1982)	26
Montana v. U.S., 450 U.S. 544 (1981)	*passim*
National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985)	30
National League of Cities v. Usery, 426 U.S. 833 (1976)	35
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	29, 30, 35
Puyallup Tribe v. Washington State Department of Game, 433 U.S. 165 (1977)	26, 28, 35
Rice v. Rehner, 463 U.S. 713 (1983)	29
State of Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)	29
United States v. Mazurie, 419 U.S. 544 (1975)	24
United States v. Wheeler, 435 U.S. 313 (1978)	28
Washington v. Confederated Tribes and Bands of the Yakima Indian Nation, 439 U.S. 463 (1979)	10, 33
White Mountain Apache v. Bracker, 448 U.S. 136 (1980)	22
Williams v. Lee, 358 U.S. 217 (1959)	24
Court Rule	
Federal Rule of Civil Procedure 52(a)	3, 21

TABLE OF AUTHORITIES—Continued

	Page
Statutes	
Federal:	
The Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. section 331 et seq.	3, 4, 23, 25, 26, 27
The Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. section 461, et seq.	26, 27
28 U.S.C. section 1254(1)	2
28 U.S.C. section 1362	8
42 U.S.C. section 1983	8
State:	
RCW 36.70, The Planning Enabling Act	12
RCW 43.21C, The State Environmental Policy Act	*passim*
RCW 58.17, Plats—Subdivisions—Dedications	15, 25
RCW 90.58, The Shoreline Management Act	25
Treaties	
Treaty of Medicine Creek, 10 Stat. 1133	28
Treaty with the Yakimas, 12 Stat. 951	3, 4, 21, 27, 28
Fort Laramie Treaty, 15 Stat. 649	27, 28
Navajo Treaty, 15 Stat. 667	27
Other Authorities	
American Land Planning Law, section 1.06, 1.08 (1974)	22
Comment, *Jurisdiction To Zone Indian Reservation*, 53 Wash.L.Rev. 677 (1978)	22

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONERS COUNTY OF YAKIMA, *et al.*

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 828 F.2d 529 (1987) and is reprinted in the Appendix to County of Yakima's Petition for a Writ of Certiorari at page 1-A.

The opinions of the United States District Court, Eastern District of Washington, in *Whiteside I* and *Whiteside II* are reported, respectively, at 617 F. Supp. 735 (1985) and 617 F. Supp. 750 (1985) and are reprinted, respectively, in the Appendices to Wilkinson's Petition for a Writ of Certiorari at page 108a, and Yakima County's Petition for a Writ of Certiorari at page 19-A.

The District Court's orally delivered Findings of Fact and Conclusions of Law in *Whiteside II* are unreported, but are reprinted in Yakima County's Petition for a Writ of Certiorari at page 43-A. The District Court's oral opinion in *Whiteside I* is reprinted at page 40 of the Appendix to Brendale's Petition for a Writ of Certiorari.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit affirming the District Court's decision in *Whiteside I*, and reversing and remanding the District Court's decision in *Whiteside II*, was entered on September 21, 1987. Yakima County's timely petition for rehearing in *Whiteside II* was denied on January 13, 1988.

Petitioner Yakima County invoked this Court's jurisdiction to review the Ninth Circuit's Judgment pursuant to 28 U.S.C. section 1254(1). This Court granted Yakima County's Petition for Certiorari on June 20, 1988. On that same date, this Court also granted the Petitions of Brendale and Wilkinson and ordered the three cases consolidated.

TREATIES, STATUTES AND RULES INVOLVED

The Treaty with the Yakimas, 12 Stat. 951, reprinted in the County's Petition at 55-A.

The Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. section 331, et seq., reprinted in Wilkinson's Petition at 194a.

Federal Rule of Civil Procedure 52(a):

> Rule 52. Findings by the Court.
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions or motions under Rules 12 or 56, or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

A. Introduction

The Confederated Tribes and Bands of the Yakima Indian Nation is an Indian tribe established by Treaty

with the United States (12 Stat. 951) with a governing body recognized by the Secretary of the Interior. Yakima County is a political subdivision of the State of Washington. The Yakima Indian Reservation is located in southeastern Washington, primarily within Yakima County. The reservation consists of approximately 1.3 million acres of land of which 80 percent is held in trust by the United States and the balance is owned in fee by members and non-members of the Tribe. The existence of "fee lands" within the exterior boundaries of the reservation is a result of the allotment policies of the Federal Government as reflected in the Treaty itself and, more importantly, the General Allotment Act (Dawes Act), 25 U.S.C. section 331, et seq.

These consolidated cases involve conflicting claims by the County of Yakima and the Yakima Indian Nation of authority to regulate the use of reservation lands owned in fee by non-members of the tribe and located in Yakima County. The consolidated cases were denominated *Whiteside I* and *Whiteside II* by the courts below and these designations have been used in the Joint Appendix herein. *Whiteside I* involves property owned in fee by petitioner Brendale within the "closed area" of the reservation.[1] *Whiteside II* involves the petitions of Yakima County, et al., and Stanley Wilkinson and concerns land owned by Wilkinson in the "open area" of the reservation. The boundary between the "open" and "closed" areas is illustrated in Exhibit 200 (J.A. 79) which is a map of the Yakima Reservation. The pattern of land tenure is also illustrated by the exhibit with fee lands

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[1] Brendale is of Yakima Indian decent, but he is not an enrolled member of the Tribe. He inherited the property at issue from his mother and grandfather who were enrolled members. The original allottee of the property was his great aunt. (Wilkinson Pet. at 123a-124a).

shaded gray in the open area and gray/green in the closed area. Allotted parcels are designated by allotment numbers.

While the closed area is not at issue in the County's case, it is necessary to briefly discuss it in order to provide the context of the lower Courts' holdings regarding the open area in *Whiteside II*. Most of the trust land within the reservation's 1.3 million acres lies within the closed area, roughly the western two-thirds of the reservation. (County Pet. 23-A; J.A. 79). Approximately 740,000 acres of the closed area is located in Yakima County of which 25,000 acres are owned in fee. Most of the fee lands are owned by non-Indian timber companies, with a single company accounting for approximately 18,000 acres. (County Pet. 24-A; Brendale Pet. App. 50). The area was declared closed to the general public by a 1954 Resolution of the Tribal Council and access is currently limited to members of the Tribe and those holding permits from the Tribe or the Bureau of Indian Affairs. Other than U.S. Highway 97, the roads in the closed area are maintained by the Bureau of Indian Affairs. The Bureau of Indian Affairs restricted use of the otherwise public roads in 1972. (Wilkinson Pet. 114a-115a).

The closed area is primarily forest land and its timber resources provide ninety percent of the Tribe's income. (Wilkinson Pet. 136a; Tr. 122-123). There are no permanent residents of that portion of the closed area located within Yakima County. The closed area also provides a source of natural foods and medicines for tribal members and plays a significant role in tribal culture and religion. (County Pet. 24-A).

B. The Wilkinson Proposal

The instant controversy began in September, 1983, when Wilkinson applied to the Yakima County Planning Department for permission to subdivide a 32-acre parcel

of reservation fee land into 20 residential lots ranging in size from 1.1 to 4.5 acres. The parcel is vacant sagebrush land located on a ridge near the northern boundary of the reservation, overlooking the Yakima Municipal Airport and the City of Yakima, which is approximately 3 miles to the north. (County Pet. 27-A-28A). Portions of the property are steeply sloped and the various lot sizes result from the need to accommodate a building site, sewage disposal system and well on each lot. (Ex. 219 at 9-10, Tr. 410).

The County applies its zoning ordinance, as well as a number of other land use regulations, to the subject property and all other fee lands located within the open area of the reservation, except within incorporated towns. The County does not apply its land use ordinances to reservation lands held in trust by the United States. The goal of the County zoning scheme as applied to Wilkinson's property and all other fee lands within the open area of the reservation is the preservation of agricultural land. (County Pet. 26-A, 27-A). Wilkinson's property is not prime agricultural land due to the steep slopes, soil types and the unavailability of irrigation water. (Tr. 248-251; Tr. 523).

The County zoning ordinance designates Wilkinson's property as "general rural" (GR). The general rural classification allows lot sizes as small as one-half acre as long as the average lot size in the subdivision equals at least one acre. The purpose of the general rural classification is to "provide protection for the County's unique agricultural resources and land base"; and "minimize scattered residential developments . . . by encouraging clustered development"; and "permit only those uses which are compatible with the rural character" of the area. (County Pet. 27-A). The general rural zone is essentially a buffer zone intended to provide protection of the more intensively used agricultural lands which are zoned either "exclusive agriculture" (EA) or "general

agriculture" (GA) under the County zoning scheme. The zone is applied to non-productive areas and contemplates a mixture of farm and non-farm uses and low density rural housing. (Tr. 44-46). Its adoption was a result of a legislative decision to focus development near the cities and away from highly productive agricultural lands. (Tr. 545).

The Yakima Indian Nation administratively challenged the County's jurisdiction to regulate land use on the subject property and also the adequacy of the County's environmental review of the proposal. The County had originally required the preparation of an environmental impact statement, but removed the requirement when Wilkinson agreed to modify his proposal to mitigate or prevent potential environmental impacts. (County Pet. 28-A). The Yakima Indian Nation received notice of the proposal as a "consulted agency" under the County's Environmental Policy Ordinance (Tr. 494-495).

The Tribe claimed exclusive authority to regulate the use of all land within the reservation, including that owned in fee by non-members. The Tribal Zoning Ordinance designated the Wilkinson property as "agricultural". The agricultural designation allowed the contemplated residential usage but required minimum lot sizes of at least five acres. Like the County's, the goal of the Tribal Zoning Ordinance as applied to the Wilkinson property and other properties in the open area is the preservation of agricultural land. (County Pet. 25-A; Tr. 36).

The Tribe's administrative appeal was heard by the Board of Yakima County Commissioners on October 25, 1983. Based upon advice from the County Legal Department, the Board of County Commissioners limited the hearing to consideration of the environmental impacts of the proposal although the Tribe argued the jurisdictional issue during the early stages of the hearing. Following the presentation of testimony and the cross examination

of witnesses, the County Commissioners concluded that the Wilkinson proposal, as modified, would not have a significant environmental impact and did not require the preparation of an environmental impact statement.[2]

The Yakima Indian Nation commenced this litigation in the United States District Court for the Eastern District of Washington on October 28, 1983. The jurisdiction of the court was invoked pursuant to 28 U.S.C. section 1362. The Tribe joined as defendants the County of Yakima, the Board of Yakima County Commissioners (Whiteside, Tollefson and Klarich), the Director of the County Planning Department (Anderwald), Stanley Wilkinson, and a Jim Gatliff and Dick Keller who were prospective purchasers of Wilkinson's land. Along with relief under 42 U.S.C. section 1983 and a pendent claim under the Washington Environmental Policy Act, the Tribe sought a "declaratory judgment declaring the rights of the parties regarding land use and entry regulations within the exterior boundaries of the Yakima Indian Reservation". (J.A. 35).

The Tribe's lawsuit in *Whiteside I*, seeking essentially the same relief, except for the pendent claim, was pending in the District Court at the same time, having been filed on September 12, 1983. (J.A. 13). The cases were tried separately. Ultimately, the District Court found that the Tribe had exclusive land use jurisdiction in the closed area in *Whiteside I* and that the County had

[2] The transcript of the hearing held before the Board of Yakima County Commissioners is in the record as Exhibit 219, Tr. 410. The written findings of fact, conclusions of law and order isued by the Board are in the record as Exhibit 222, Tr. 267. The exhibits considered by the Board at the hearing are in the record as Exhibits 221-1 through 221-27, Tr. 267. The Washington State Environmental Policy Act, Revised Code of Washington Chapter 43.21C, requires testimony under oath, written findings and conclusions, and the establishment of a permant record, in administrative appeals of environmental decisions.

exclusive land use jurisdiction over fee lands in the open area in *Whiteside II*.

Much of the testimony and evidence adduced during the trial on the merits in *Whiteside II* concerned the nature of the open area of the reservation, the regulatory interest of the two governments over the fee lands, and, the nature and quality of the land use regulations of the two governments as applied to the fee lands in light of the common goal of agricultural preservation. Such evidence might, at first blush, seem irrelevant to the determination of a purely jurisdictional question. However, in the field of Indian law, and particularly in light of this Court's ruling in *Montana v. U.S.*, 450 U.S. 544 (1981) such evidence is crucial to the question and requires elaboration at some length.

C. The Open Area

Most of the fee lands within the Yakima Indian Reservation are concentrated in the northeastern portion of the reservation within the "open area". As the name implies, there is no limitation of access to this part of the reservation and non-tribal members move freely throughout the area. Indeed, Yakima County maintains approximately 500 miles of public roads in this portion of the reservation. (County Pet. 6-A).

The open area consists of approximately 350,000 acres of land in Yakima County of which about half is owned in fee. (County Pet. 44-A, 45-A, 24-A). The population of the open area is approximately 25,000, of which 5,000 are Indians.[3] There are three incorporated cities within the open area: Harrah, population 345; Toppenish, population 6,575; and Wapato, population 3,110. (County Pet. 29-A; Tr. 358). In the immediate area of the Wilkinson property, the north side of Ahtanum Ridge near the res-

[3] The Yakima Indian Reservation is the third most populated reservation in the United States according to 1980 census data.

ervation's northeastern boundary, there are 48 Indian residents and 484 non-Indian residents. (Tr. 154).

Most of the open area is range and irrigated farmland, but residential and commercial uses also exist, primarily near the cities. (County Pet. 24-A). The fee lands lie within the three incorporated cities and are scattered in the now familiar checkerboard fashion throughout the balance of the open area. (County Pet. 23-A). *See*, Ex. 200, J.A. 79, illustrating the pattern of land tenure.[4]

Yakima County is one of the leading agricultural counties in the United States, ranking in the top twenty in agricultural income. At the time of trial, total agricultural production for the County was estimated at approximately $350,000,000.00 per year based upon statistics from 1982 and 1983. The County is a leading producer of high value crops, such as apples, cherries, grapes, mint, and hops, and is also a major producer of wheat and cattle. The County contains 358,000 acres of cropland of which 330,000 are irrigated, accounting for twenty-five percent of all irrigated land in the state of Washington. (Ex. 244, at 1-5, Tr. 425; Tr. 415-417; Tr. 420; Tr. 424). Every dollar of farm income "turns over" about three times within Washington state, mostly within the county of origin as it is spent for debt service, new equipment, repairs and maintenance, new buildings, chemicals and fertilizers, and the like. Viewed in that light, agriculture in Yakima County is a billion dollar a year industry. (Ex. 244, at 2, Tr. 425).

The open area of the Yakima Indian Reservation plays a significant role in Yakima County's agricultural economy. Slightly less than one-third, approximately $105,000,000.00 annually, of the County's total argicultural production is attributable to open area reservation lands. (Exhibit 244 at 1, Tr. 425; Tr. 416-417). The reservation contains 143,000 acres of irrigated land, well over one-third of the County's total. Of the 143,000 irrigated acres within the reservation, 63,179 are owned in fee by non-members of the Tribe, and 63,466 are leased to non-members of the Tribe. (Tr. 418; Tr. 422). The irrigated reservation fee land owned and farmed by non-members yields greater than fifty percent of the agricultural income attributable to lands within the reservation even though it comprises less than fifty percent of the reservation's irrigated acreage because it is planted in permanent crops such as apples. (Tr. 422-423).

[4] This Court previously considered the population and pattern of land tenure of the Yakima Indian Reservation in *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation*, 439 U.S. 463, 469-470 (1979).

The Yakima Indian Nation does not derive significant income from the agricultural activities carried out in the open area. As previously indicated, ninety percent of the Tribe's income comes from its timber resources located in the closed area. (Tr. 123; Tr. 148; Tr. 149). Individual members of the Tribe holding allotments within the open area do derive income by leasing their allotted property, generally to non-Indian farmers. (Tr. 123; Tr. 148). Also, members of the Tribe are employed in agricultural support industries. (Tr. 123).

In addition to the road system previously mentioned, Yakima County provides a full range of governmental services to the open area of the reservation. The County services offered to reservation residents are precisely the same as those offered to other areas of the county and are available to both Indians and non-Indians without discrimination. (Tr. 546-547). All adult residents of Yakima County, Indian and non-Indian, are eligible to vote in County elections. (Tr. 169). The non-Indian owners of fee lands within the open area of the reservation look to Yakima County for governmental services. (Tr. 555).

At the time of trial, Yakima County collected property taxes on all fee lands within the reservation. Those lands

included 10,467 separate parcels with an assessed valuation of $421,167,325.00, approximately ten percent of the County's total tax base. (Ex. 217, Tr. 410; Ex. 218, Tr. 410).[5]

The Yakima Indian Nation also offers governmental services to the open area of the reservation. (Tr. 126-130). However, as testified to by a tribal council member, while these services are theoretically open to all, they actually only serve Indian residents of the reservation. (Tr. 143-144). The two governments cooperate in providing police protection to the open area. (Tr. 286; Tr. 291).

D. Yakima County Land Use Regulation Within the Open Area

Yakima County has exercised land use jurisdiction over fee lands within the open area of the reservation for over thirty-five years, which is precisely as long as the County has exercised land use jurisdiction generally. (County Pet. 44-A, 26-A; Tr. 437-459). The County has never attempted to regulate the use of trust lands. (County Pet. 27-A). The nature of the various County land use regulations and the history of their application to open area reservation lands is briefly described as follows.

1. *Comprehensive Plans*

Under Washington's statutory scheme, RCW 36.70, the Planning Enabling Act, a comprehensive plan, is a general guide for the growth and development of the County. It serves as the basis for the adoption of official land use controls, such as zoning and subdivision regulations. (Tr. 439-440).

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[5] On May 10, 1988, Judge Alan A. McDonald of the Eastern District of Washington entered a Judgment enjoining the County from taxing reservation fee land owned by tribal members. *Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, et al.*, No. C-87-654-AAM. That case is currently on appeal to the Ninth Circuit. Docket No. 88-3926.

The first comprehensive land use plan for the County was adopted in December, 1967. The land use map contained within the plan designated the Yakima Indian Reservation as predominantly forest watershed and general agriculture. A major updating of the plan occurred in 1977, however, the predominant land use designations within the Yakima Indian Reservation remained unchanged. (Tr. 439).

There are three incorporated municipalities within the exterior boundaries of the Yakima Indian Reservation: Toppenish, Wapato and Harrah. In order to provide more specific policies for guiding land use decisions on fee lands within and surrounding those cities, the County and the municipalities have jointly adopted sub-area plans for each community. (Tr. 443-444). The Toppenish sub-area plan was adopted in September of 1980 (Ex. 208, Tr. 347), the Harrah sub-area plan was adopted in March of 1981 (Ex. 209, Tr. 344), and the Wapato sub-area plan was adopted in May of 1981 (Ex. 210, Tr. 344). These plans focus on the special circumstances surrounding each community and are supplements to the 1977 General Comprehensive Plan.

In March of 1981, the County adopted the Rural Land Use Plan as a supplement to the Comprehensive Plan. (Ex. 207, Tr. 347). The focus of the plan is on Yakima County's rural areas and its purpose is to provide policy guidelines for preserving the County's agricultural economic base. The plan served as a basis for the adoption of major text and mapping amendments to the Zoning Ordinance. (County Pet. 26-A, 30-A).

2. *Zoning*

Yakima County began regulating land use activities in 1946 under the terms of a temporary zoning resolution. Special permits were required for nuisance activities and building permits were required for all structures within the unincorporated areas of the County. Six "special

nuisance permits" were issued for fee lands within the Yakima Indian Reservation under the terms of this original code. (Tr. 437-438).

The County's first zoning ordinance was adopted in 1965 (Ordinance 1-1965) and was applicable to "all lands within the boundaries of Yakima County lying outside the limits of any incorporated city or town". All such lands were zoned "general use" and all activities not expressly prohibited were permitted outright except for certain potentially noxious uses which required conditional use permits. Conditional use permits for such uses as a blood plant, an oil bulk plant, and several feedlots, were processed for fee lands within the exterior boundaries of the reservation under the terms of the 1965 Ordinance. (Tr. 438-439).

The County's first comprehensive zoning ordinance was adopted in January of 1972. (Ex. 212, Tr. 344; Tr. 440). The ordinance established nine new use districts generally regulating agricultural, residential, commercial, industrial and forest watershed uses. The ordinance also regulated non-conforming uses, provided for special property uses and established a Board of Adjustment to hear variance and special property use applications.

After the 1972 ordinance was successfully challenged on procedural grounds, it was readopted in essentially the same form in October of 1974. Lands within the Yakima Indian Reservation boundary were clearly distinguished on the official zoning map as being either fee or trust lands. (County Pet. 26-A).

Major mapping and text changes were adopted in March of 1982 to implement the Rural Land Use Plan supplement to the County Comprehensive Plan. The most significant change was the replacement of the single "agricultural" use district with three new and and more restrictive agricultural zones, "exclusive agricultural", "general agricultural" and "general rural". The vast

majority of fee lands within the Yakima Indian Reservation which were located in the former "agricultural" district were designated "exclusive agricultural", the most restrictive of the three new zones. The "exclusive agricultural" district is intended to preserve and maintain areas for the continued practice of agriculture and to permit only those new uses which are compatible with agricultural activities. The minimum lot size in this district is 40 acres, with limited exceptions. Generally, the exceptions permit the creation of one new lot, at least one-half acre in size, but not greater than two acres in size, once every five years. (Ex. 246, Tr. 471; Ex. 200, Tr. 29; Tr. 447-453; County Pet. 26-A - 27-A).

The "general agricultural" use district contains virtually the same restrictions as the "exclusive agricultural", except that the minimum lot size is 20 acres. (County Pet. 26-A). The characteristics of the "general rural" zone were discussed above.

Since 1974, the following land use decisions have been made by Yakima County concerning fee lands within the open area of the reservation:

Special Property Use Permits—42 files processed dealing primarily with mobile homes, surface mining, churches, firestations, day care centers.

Rezones—11 files processed including various zoning classifications and uses.

Variances—19 files processed mostly involving building set backs or lot sizes.

Building Permits—780 issued since 1972. (Tr. 498; Tr. 538).

3. *Subdivisions*

Yakima County adopted its first comprehensive subdivision ordinance in November of 1974, Ordinance No. 10-1974, Yakima County Code Title 14. (Ex. 213, Tr. 344). Prior to that time, the County reviewed and approved plats under the authority of RCW 58.17 and

its predecessor statutes. (Tr. 453). The County Subdivision Ordinance requires that the subdivision of land conform with adopted standards for streets, water, sewage, drainage, parks and recreation areas, school sites and the like. (County Pet. 27-A).

Since 1960, the County has processed and approved fourteen long plats creating approximately 250 lots on lands within the exterior boundaries of the Yakima Indian Reservation, including one plat submitted by the Tribe for some of its land located near White Swan, Washington. (Tr. 455). Since 1975, the County has administratively processed 148 short plats of fee lands on the reservation and 90 short plat exemptions have been authorized concerning such matters as boundary line adjustments and financial segregations.[6]

4. *Shorelines*

Since 1974, as mandated by state law, the County has had a Shorelines Master Program regulating the use of shorelines within the County, including those of the Yakima River and Ahtanum Creek on the reservation. The County has processed several shorelines permits for surface mining activities on fee lands along the shorelines of the Yakima River on the reservation. (Ex. 214, Tr. 344; Tr. 496).

5. *Federal Flood Insurance Program*

Since 1974, the County has participated in the Federal Flood Insurance Program administered by the Federal

[6] A "short plat" is the division of land into four or fewer parcels. Under Washington's statutory scheme, such divisions are administratively approved provided they comply with other land use regulations and applicable development standards. (Tr. 456-457)

A "long plat" is the division of land into five or more parcels. It is a more formalized process involving public hearings, notice to surrounding property owners, approval by the Board of County Commissioners, and the application of generally higher development standards. (Tr. 455-456).

Emergency Management Agency. The program regulates the development of flood-prone areas and applies to fee lands within the Yakima Indian Reservation. The County's participation in the program enables County residents to purchase flood insurance. (Tr. 497).

6. *State Environmental Policy Act (SEPA)*

All non-exempt land use decisions made by Yakima County are subject to environmental review under the provisions of the State Environmental Policy Act, RCW 43.21C.

E. Tribal Zoning Regulations

The Tribal Zoning Ordinance is its only land use control. The initial Tribal Zoning Ordinance was adopted in 1970 and was patterned after the then existing County Ordinance. (County Pet. 24-A). The current ordinance was adopted in 1972 and has apparently not been amended since. (Ex. 006, Tr. 28; J.A. 38). The ordinance establishes five use districts generally regulating agricultural, residential, commercial, industrial and reservation restricted area uses. It also provides for planned developments and special property uses in designated zones. The ordinance is administered by the zoning administrator and the Tribal Council sitting as the Board of Adjustment. Except for the five-acre minimum lot sizes in the agricultural district and the reservation-restricted zone, the ordinance is virtually identical to the ordinance adopted by Yakima County in 1972. (Tr. 193-194).

Under the administrative scheme established by the ordinance, applications are first submitted to the tribal zoning administrator. The application fee is $5.00. (Tr. 120). The administrator has authority to approve applications except for special property use permits and variances which are referred to the Tribal Council. No on-site inspections are conducted for building permits issued by the administrator concerning fee lands. (Tr. 202).

The Tribal Council, sitting as the Board of Adjustment, has authority to hear appeals from determinations of the zoning administrator and to issue variances and special property use permits. (J.A. 50). The Board of Adjustment's decisions are final as there is no right of appeal, either administrative or judicial, from its decisions. (Tr. 158). Section 10 of the Tribal Ordinance concerning appeals of Board of Adjustment decisions reads as follows:

> SECTION 10, APPEAL FROM THE BOARD OF ADJUSTMENT
>
> Nothing in this ordinance shall be construed to be a waiver of sovereign immunity by the Yakima Indian Nation and its officers and agents. (J.A. 54).

Section 16 of the Ordinance establishing penalties for violation provides for the enjoining of non-conforming uses and, "in extreme cases" the expulsion of violators from the reservation. (J.A. 56).

While the terms of the 1972 Ordinance make it applicable to all land within the reservation, the Tribe has "not opted" to attempt to exercise zoning jurisdiction within the incorporated cities although it claims the authority to do so. (Tr. 117; Tr. 194-196). The Tribe's official zoning map of 1973 contained on page 103 of Exihbit 8 (Tr. 28; Tr. 193-194) shows tribal zoning of the cities.

Since 1972, the Tribe has processed 883 land use applications of which 317 were submitted by non-members of the Tribe. Of those 317, approximately 16 were for variances and three for planned developments with the balance being, apparently, simple building permits. (Tr. 118-119).

The Tribe does not attempt to regulate the subdivision of land other than through the variance process. A number of the applications processed by the Tribe concern variances from the five-acre minimum lot size in the agricultural zone. (Tr. 161). Under the tribal regulatory scheme, lands located within the agricultural zone could be completely subdivided into five acre parcels without tribal review of any kind or the application of any development standards. (Tr. 171).

In addition to the Tribe's efforts at regulating land use, several tribal witnesses, notably Tribal Council member Anthony Washines, testified concerning the Tribe's efforts to reacquire fee land and return it to trust status. As of the time of trial, the Tribe had expended $54,000,000.00 in that pursuit. (Tr. 109-110; Tr. 317).

F. Proceedings Below

Following the trial on the merits in *Whiteside II*, the District Court found that the Yakima Indian Nation was without authority to exercise regulatory land use jurisdiction over non-Indian fee lands within the open area of the reservation. The court held that the issue of tribal authority was determined by the test set forth in *Montana v. U.S.*, 450 U.S. 544 (1981). That is, inherent tribal sovereignty generally does not extend to the activities of non-members of the tribe on fee lands absent a consensual relationship or unless the non-members' conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

The District Court discussed in general terms the differences between the open and closed areas and also made specific findings of fact in both its oral and written opinions. (County Pet. 43-A - 46-A; 23-A - 31-A). Several of the court's findings are particularly noteworthy: (1) The County has exercised zoning jurisdiction over fee lands in the open area for thirty-five years without legal challenge from the tribe prior to the Wilkinson project; (2)

The County zoning scheme as applied to the fee lands in the open area is more protective of agricultural lands than the Tribe's; (3) The trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Yakima Indian Nation and the proposed development does not threaten the food source of members of the Tribe; (4) The County's regulation of the Wilkinson property does not in any way threaten the economic security of the Tribe; (5) In contrast to the closed area, the open area is not of unique religious or spiritual significance to members of the Yakima Nation. (County Pet. 45-A; 30-A). The court concluded:

> "As stated in the Findings of Fact, this court finds that Wilkinson's proposed development does not pose a threat to the 'political integrity', the 'economic security' or the 'health and welfare' of the Yakima Nation. The mere fact that the Tribe's Zoning Ordinance differs in some respects from that of Yakima County does not rise to the level of a 'threat' to the Tribe. As applied to the 'open area', Yakima County's zoning ordinance will adequately regulate the land use of the fee lands and not pose a threat to the trust lands. Consequently, this court must conclude that the Yakima Nation is without authority to exercise regulatory jurisdiction over Wilkinson's 'Open Area' free land." (County Pet. 37-A).

In reaching his decision, the trial judge was cognizant of a sincere desire by the Tribe to reacquire fee lands and, by so doing, reverse the effects of the allotment process. In rendering his oral opinion, the trial judge made it clear that he was not unsympathetic to those desires, but that he was mandated to decide the case by the principles of law established by the decisions of this Court and the enactments of Congress:

> In utilizing the *Montana* standards, I am not unmoved by the desire of the Tribe and the Members thereof to have its treaty lands returned to it, but that does not, in my opinion, justify my findings that

> such a desire constitutes a threat to the political integrity, the economic security, or the health or welfare of the Tribe and its Members. (County Pet. 50-A).
>
> I am unable to find that the desire, the sincere desire of the Tribe and its Members to have the deeded land restored to it is such as interferes with the political integrity, the economic security, or the health or welfare of the Tribe and its Members. Once again, that is a matter for the legislative branch, not the judicial branch to determine. (County Pet. 51-A).
>
> I suggest to the Yakima Indian Nation that despite your sincere belief that all the land within the exterior boundaries should be returned in accordance with the Treaty of 1855, that that may be some time in coming. I think you recognize that that is a matter for the legislative branch of this government to decide; to-wit: Congress. (County Pet. 52-A).

Finally, in the same oral opinion, the judge explained why his ruling in *Whiteside I*, wherein he found the Tribe had exclusive regulatory jurisdiction, was just the opposite from that in *Whiteside II*. He stated:

> While this case [*Whiteside II*] also involves land within the exterior boundaries of the Yakima Indian Reservation, the factual circumstances in the two cases are strikingly different. They are as different, in my opinion, as night and day. (County Pet. 44-A).

The Ninth Circuit Court of Appeals affirmed *Whiteside I*, but reversed *Whiteside II*, holding that the tribe retained both treaty reserved and inherent sovereignty to regulate land use on fee lands owned by non-members in the open area as a matter of law under *Montana v. U.S., supra.* In so holding, the court did not find erroneous pursuant to Cr 52(a) any of the findings of the District Court. Rather, the court held that since the Tribe admittedly has exclusive authority to zone trust lands, it must

also have authority over fee lands in order to engage in comprehensive planning:

> Further, a major goal in zoning is the "systematic and coordinated utilization of land" in a particular area. N. Williams, *American Land Planning Law*, section 1.06 (1974), *cited in* Comment, 53 Wn. L. Rev. at 679. Comprehensive planning enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses in a desirable pattern. *Id.* at section 1.08, *cited in* Comment, 53 Wn. L. Rev. at 685. Yakima Nation has exclusive authority to zone tribal trust land, which constitutes nearly all of the closed area and over half of the open area. Although the fee land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checkerboard pattern. If we were to deny Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme. This we are unwilling to do. (County Pet. 13-A).

The Court held that since zoning is a proper exercise of the police power precisely because it is designed to promote the health and welfare of citizens, it is per se within the ambit of the exception to the *Montana* rule regarding non-Indian conduct which threatens tribal health or welfare. (County Pet. 11-A - 12-A).

The Court of Appeals did not rule that County regulation of fee land was preempted by federal law or policy. It concluded that based upon the status of the record it could make no finding on the issue. It remanded the case to the District Court to make findings concerning the County's regulatory interest pursuant to the preemption/balancing of interest analysis of the *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980) line of cases. Apparently, concurrent jurisdiction would exist if the District Court found in favor of the County on remand.

The Mandate of the Ninth Circuit has been stayed pending review by this Court. (J.A. 9, 10).

SUMMARY OF ARGUMENT

There are no federal statutes which authorize the zoning of fee lands on the reservation, nor are there any treaty derived rights granting such authority. In fact, the policy of the federal government has been to divest the tribes of any regulatory control over non-Indians on fee land. This policy is reflected in the General Allotment Acts and the case law reviewing its effects. As a result, any treaty reserved right is limited to those lands still set aside for "exclusive use" of the tribe, the trust lands.

There has been implicit divestiture of tribal sovereignty in those areas involving the relations between Indian tribes and non-members. The essence of inherent sovereignty is primarily internal, generally consisting of the power to punish tribal offenders, determine tribal membership, regulate domestic relations among members and prescribe rules of inheritance. As a result, a tribe can exercise civil regulatory control over a non-member only if there is a consensual relationship or the non-Indian's conduct will have "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe". *Montana*, 450 U.S. at 566.

The Ninth Circuit determined that since zoning is an exercise of the police power, which by definition is the power to promote public health, safety and welfare, the Tribe has such power regardless of any factual finding concerning its necessity. This reading of *Montana* causes the exception to swallow the rule in that it would grant tribes virtually unlimited police power jurisdiction over the conduct of non-members on fee lands.

The undisturbed finding of the District Court clearly establish that the circumstances necessary to confer tribal

jurisdiction are absent in *Whiteside II*. The County has not abdicated or abused its responsibility of regulating the fee lands and that regulation does not threaten, but in fact protects, tribal interests.

Jurisdiction based on land tenure classification is neither irrational nor arbitrary and protects the interests of both Indians and non-Indians. The time has come for this court to establish a bright-line test for civil regulatory control over the land within Indian reservations. The states and their political subdivisions should control the fee land and the tribes should control the trust lands. This rule would give effect to existing federal laws, the treaties and state laws. It would insure that rights of the non-Indians were protected while protecting the interests of the tribes and their members.

ARGUMENT

I. Introduction.

Initially, we recognize that Indian tribes are "unique aggregations possessing the attributes of sovereignty over both their members and their territory". *United States v. Mazurie*, 419 U.S. 544, 557 (1975). As such, Indian tribes constitute political communities enjoying some sovereign powers over both members and non-members within reservation boundaries. *Williams v. Lee*, 358 U.S. 217, 223 (1959). We are also cognizant of the federal government's long standing policy of encouraging tribal self-government, a principle which has been repeatedly reiterated by this court. *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987).

It is not our contention, then, that there are no conceivable set of circumstances under which a non-Indian, even on fee land, will be subject to some form of tribal jurisdiction. It is our contention that the Ninth Circuit's decision in *Whiteside II* constitutes a signficant distortion of this Court's teachings concerning the limitations of

tribal sovereignty over non-members, and is in direct conflict with the will of Congress as expressed in the Allotment Acts.

The scope of tribal sovereign powers, particularly as related to the activities of non-members on fee lands, has been discussed most thoroughly in the case of *Montana v. U.S.*, 450 U.S. 544 (1981). While reaching opposite results, both the District Court and the Court of Appeals agreed that this case is controlled by the *Montana* test. Accordingly, we will begin our discussions with an analysis of the *Montana* decision as it relates to the facts and circumstances of *Whiteside II*.

II. The Federal Policy of Land Allotment Has Divested the Yakima Tribe of Any Treaty Rights to Regulate the Use of Non-Member Owned Fee Land Within the Open Area of the Reservation.

Montana involved the assertion of tribal authority over hunting and fishing by non-members on fee lands within the Crow Reservation in Montana. The State likewise asserted jurisdiction to license and regulate non-members of the Tribe on fee lands within the boundaries of the reservation. This Court held that there was no tribal jurisdiction to so regulate the non-members and explicitly recognized the power of the State to continue its regulatory activities.

The issue here, as in *Montana*, is whether a tribal law can and should preempt state and local laws. It should be noted that while the County's zoning ordinance is the only specific law at issue in this action, the Ninth Circuit's ruling will also effect a number of other state laws, implemented by local ordinances, concerning comprehensive planning and land use. As a result of the Ninth Circuit's opinion, the following state laws will no longer have any effect on the Yakima Reservation: Plats-Subdivisions-Dedications, RCW 58.17; Shoreline Management Act of 1971, RCW 90.58; State Environmental Policy Act, RCW

43.21C. What powers do Indian tribes possess that would permit such a result?

"The powers possessed by Indian tribes stem from three sources: Federal statutes, treaties, and the tribe's inherent sovereignty." *Merrion v. Jicarilla*, 455 U.S. 130, 168 (1982). (Stevens, J., dissenting) No federal statute authorizes or directs the Yakima Indian Nation to zone fee land on the Yakima reservation. Such power, if it exists, must be based upon the Treaty or inherent sovereignty.

With regard to treaty derived power, this Court in *Montana* stated that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands". 450 U.S. at 561, citing *Puyallup Tribe v. Washington State Department of Game*, 433 U.S. 165 (1977) (*Puyallup III*). Noting that the main cause of the alienation of tribal lands was the Allotment Acts, the Court found that Congress specifically intended the divestiture of tribal jurisdiction over such lands. "There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the Congressional debates, allotment of Indian land was consistently equated to the dissolution of tribal affairs and jurisdiction." 450 U.S. at 559-60, n.9. The Court continued: "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when the avowed purpose of the allotment policy was the ultimate destruction of tribal government". *Ibid.*

The *Montana* Court was cognizant of the fact that the allotment policy is now discredited and was repudiated in 1934 by the passage of the Indian Reorganization Act, 48 Stat. 984, at 25 U.S.C. section 461, et seq. The Court found, however, that the repudiation was not

relevant in the analysis of the effect of the land alienation occasioned by the allotment policy on Indian treaty rights tied to Indian use and occupation of reservation lands which are, in fact, no longer used or occupied by Indians. *Montana*, 450 U.S. at 559, n.9. Notwithstanding the Indian Reorganization Act, the intended effects of the allotment policy continue and must be addressed in light of present realities.

The salient provisions of the Treaty with the Yakimas are very similar to the Fort Laramie Treaty, 15 Stat. 649, at issue in *Montana*. Article 2 of the Yakima Treaty creates a reservation for the "exclusive use and benefit" of the Confederated Tribes. (County Pet. 56-A). Article 2 of the Fort Laramie Treaty reserves land for the "absolute and undisturbed use and occupation" of the Crow Tribe. Both treaties contain assurances against non-Indian settlement of the reservations without tribal consent. In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), this Court found that similar provisions in the Navahoe Treaty of 1868 were meant to establish the lands within the reservation as within the exclusive sovereignty of the Tribe under general federal supervision. 411 U.S. 174-175. Tribal sovereignty, at least as defined by the Treaty, is grounded in the "exclusive use" language.

Obviously, however, intervening federal policies as implemented by the Allotment Acts have resulted in large numbers of non-Indian residents and landowners on the Yakima Reservation. Any treaty reserved right to regulate land use is limited to those lands still set aside for the "exclusive use" of the Tribe, the trust lands. The Yakima Treaty contains no explicit grant of sovereignty over fee lands and cannot sustain tribal jurisdiction over non-Indian conduct on such lands any more than the Fort

Laramie Treaty in *Montana* or the Treaty of Medicine Creek in *Puyallup*.[7]

III. The Yakima Indian Nation's Inherent Sovereign Power Does Not Generally Extend to the Activities of Non-Indians on Fee Lands and Will Not Sustain Tribal Land Use Jurisdiction Over Such Lands.

Finding no treaty derived power for the Crow Tribe to exercise regulatory authority over the activities of non-members on fee lands, the *Montana* Court then considered whether the Tribe's "inherent sovereignty" would sustain such jurisdiction. The Court cited *United States v. Wheeler*, 435 U.S. 313 (1978) for the proposition that there has been an implicit divestiture of tribal sovereignty in those areas involving the relations between an Indian tribe and non-members of the tribe. The Court found the essence of inherent sovereignty to be primarily internal, describing it as a power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members and to prescribe rules of inheritance. 450 U.S. at 564. The court noted the extremely limited nature of the power: "But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation". 450 U.S. at 564. "The sovereignty that the Indian tribes retain is of a unique and limited character, exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler, supra*, at 323.

The limited and primarily internal nature of tribal sovereignty is founded, primarily on the inability of non-

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[7] The Court of Appeals' decision quotes the Yakima Treaty as guaranteeing the Tribe the right to "its own government" and "its own laws". (County Pet. 10-A). The quoted language does not appear in the Treaty.

members to participate politically in tribal government. In *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court sustained Washington's power to tax cigarette sales to Indian residents of the Colville Reservation who were non-members of the governing tribe. The Court held that the imposition of Washington's tax on these purchasers would not contravene the principle of tribal self-government, "for the simple reason that non-members are not constituents of the governing tribe". 447 U.S. at 161. The Court continued "there is no evidence that non-members have a say in tribal affairs or significantly share in tribal disbursements". *Ibid.* "The traditional immunity is not based on race, but accouterments of self-government in which a non-member does not share." (Rehnquist, J., concurring and dissenting) 447 U.S. at 187.

Likewise, in *Rice v. Rehner*, 463 U.S. 713 (1983), the Court found that state regulation of liquor sales to non-Indians or non-members of the Pala Tribe by a federally registered Indian trader did not contravene the principles of tribal self-government. "If there is any interest in tribal sovereignty implicated by imposition of California's alcoholic beverage regulation, it exists only insofar as the state attempts to regulate retail sales of liquor to other members of the Pala Tribe on the Pala Reservation." 463 U.S. at 721 (1983).

The *Montana* Court found that regulation of hunting and fishing by non-members on lands no longer owned by the Tribe bore "no clear relationship to tribal self-government or internal relations" and thus could not be sustained under the general principles of tribal sovereignty. 450 U.S. at 564. The Court bolstered its general finding by citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) which held that an Indian tribe

had no criminal jurisdiction over non-Indians.[8] The Court found: "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." 450 U.S. at 565.

The Court found, generally, that inherent tribal sovereignty over the conduct of non-members on fee lands exists only when the non-members have entered consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements.[9] 450 U.S. at 565. However, the Court qualified its holding in a way which has led substantially to the confusion which we now face. The Court stated: "The Tribe *may* also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. (Emphasis added).

The meaning of this paragraph is the heart of the issue in *Whiteside II*. The Ninth Circuit reads it as meaning that "a tribe also retains" such power over non-Indians on matters concerned with health and welfare. (County Pet. 11-A). Since zoning is an exercise of the police

[8] The Court noted that lack of criminal jurisdiction would seriously restrict a tribe's ability to regulate non-Indian hunting and fishing. 450 U.S. 565 n.14. That point is equally valid concerning tribal regulation of land use by non-Indian fee owners.

[9] The two recent cases dealing with tribal court civil jurisdiction over non-Indians, *National Farmers Union Insurace Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987) fit comfortably within this exception to the *Montana* rule. Both involved insurance companies which chose to do business on a reservation. *National Farmers* involved insurance coverage of a state owned school on a reservation attended by predominantly Indian children, and *Iowa Mutual* involved insurance coverage of an Indian owned ranch.

power, which by definition is the power to promote public health, safety and welfare, the Court of Appeals concludes that tribes have such power regardless of any factual finding concerning its necessity. This reading of *Montana* causes the exception to swallow the rule in that it would grant tribes virtually unlimited police power jurisdiction over the conduct of non-members on fee lands.

The fish and game regulations at issue in *Montana* were themselves police power regulations. *Lawton v. Steele*, 152 U.S. 133 (1894). That fact alone negates any conclusion that *Montana* equated the concept of inherent tribal sovereignty with traditional governmental police powers. Moreover, the language of the key paragraph, the so-called "second exception" to *Montana*, is obviously more tentative and was not intended to impose tribal authority in all areas involving health, safety or welfare. The tribe "may" retain "power to exercise civil authority". Such permissive power is dependent first on a showing that the activity of the non-Indians in question may pose a threat to or have some "direct effect on the political integrity, the economic security, or the health or welfare of the tribe". Second, assuming such a showing can be made, the tribe must show that those real tribal interests are, in fact, endangered by the activities of non-members; i.e., without protection by other entities with jurisdiction, such as county, state or federal governments.

The *Montana* Court indicated that the existence of state regulation of non-Indian conduct on fee lands is relevant in determining tribal power over non-members. The court noted that the Tribe had "accommodated itself to the state's near exclusive regulation of hunting and fishing on fee lands within the reservation". 450 U.S. 565. The Court further found that there had been no showing that the state had "abdicated or abused its responsibility" for protecting and managing wildlife or that non-Indian hunting and fishing on fee lands imperiled the

subsistence or welfare of the Tribe. 450 U.S. 544, n.16. The Court finally noted that Montana's regulatory scheme did not prevent the Crow Tribe from regulating hunting and fishing on the trust lands in reaching its conclusion that the Tribe's political integrity or economic security was not threatened by state regulation. 450 U.S. at 566, 567.

The District Court in *Whiteside II* made precisely the same findings, undisturbed by the Court of Appeals, concerning Yakima County's regulation of fee lands within the open area of the reservation: The County has exercised zoning jurisdiction over fee lands in the open area for 35 years without legal challenge from the tribe prior to the Wilkinson project; the County zoning scheme as applied to fee lands is more protective of agricultural lands than the Tribe's; the trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Tribe; the County's regulation of the Wilkinson property does not in any way threaten the economic security of the Tribe; in contrast to the closed area, the open area is not of a unique religious or spiritual significance to members of the Tribe; the County zoning ordinance will adequately regulate the fee lands and not pose a threat to the trust lands. (County Pet. 45-A; 30-A; 37-A). Yakima County cannot be said to have abdicated or abused its responsibility of regulating land use on the fee lands within the open area.

Montana requires a particularized inquiry into the facts of each case to determine whether tribal authority exists. In light of the undisturbed findings of the trial court, the Ninth Circuit's conclusion that tribal zoning authority exists over the fee lands in the open area must be reversed.

IV. Jurisdiction Based on Land Tenure Classification Is Neither Irrational nor Arbitrary and Protects the Interests of Both Indians and Non-Indians.

The time has come for this court to establish a bright-line test for civil regulatory control over the land within Indian reservations. The states and their political subdivisions should regulate the fee land and the tribes should regulate the trust lands. This rule would give effect to existing federal laws, the treaties and state law. Jurisdiction based on land tenure classification is not unique to Indian law, *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation,* 439 U.S. 502 (1979)[10] and it works well. It assures that non-members are protected and regulated by governments in which

[10] The Court of Appeals' findings regarding checkerboard jurisdiction are at odds with the teachings of this Court in *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation,* 439 U.S. 502 (1979). In that case, the Yakima Nation challenged the State of Washington's partial assumption of jurisdiction over the Yakima Reservation pursuant to PL 280. The state assumed complete jurisdiction only over reservation fee lands. The Tribe alleged that the land tenure classification violated the equal protection clause and was difficult to administer. In rejecting the Tribe's claims, this Court held:

> "The lines the State has drawn may well be difficult to administer. But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction. (Citations omitted). Chapter 36 is fairly calculated to further the State's interest in providing protection to non-Indian citizens living within the boundaries of a reservation, while at the same time allowing scope for tribal self government on trust or restricted lands. The land tenure classification made by the State is neither an irrational nor arbitrary means of identifying those areas within a reservation in which tribal members have the greatest interest in being free of state police power. Indeed, many of the rules developed in this Court's decisions in cases accommodating the sovereign rights of the Tribe with those of the States are strikingly similar. (Citations omitted). In short, checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution." 439 U.S. 502.

they have a political voice and that judicial remedies are available should those governments regulate improperly or excessively. At the same time, tribal sovereignty over its lands and members is undisturbed.

Yakima County and the State of Washington have exercised civil jurisdiction over non-Indians and the fee lands on the Yakima Reservation since the lands were patented. 25 U.S.C. 349.

This scheme has worked well and there is nothing in the record of either *Whiteside I* or *Whiteside II* to the contrary. In fact, the record in both of those cases indicate that the County has been sensitive to the rights and interests of the Yakima Indian Nation. In *Whiteside I* the County ordered an Environmental Impact Statement as requested by the Yakima Nation. The Tribe, however, chose not to wait and see if the County would approve the subdivision proposed by petitioner Brendale, but chose to sue instead. In *Whiteside II*, the Tribe appealed the decision by the zoning administrator to the Board of County Commissioner and again chose to challenge the County's jurisdiction in federal court rather than exhausting the state remedies available to it. There is no legal reason why this court should not adopt the rule suggested herein, namely, there is no federal law, no treaty right, or inherent authority or sovereignty right which requires an opposite conclusion.

The rights of all of the interested parties are protected by this rule. If Yakima County were to make a regulatory decision concerning fee lands which the Yakima Nation opposes, it would have all of the rights and remedies afforded to any citizen of the State of Washington, as demonstrated by the record. The Tribe is aware of those rights and how to use them. The Tribe successfully sued Yakima County in state court challenging a 1974 development off the reservation on the basis of the State Environmental Policy Act. *Con-*

federated Bands and Tribes of the Yakima Indian Nation v. Johnson, 40 Wn. App. 1032 (1985).

The Puyallup Tribe in the State of Washington has alienated all but 22 acres of an 18,000-acre reservation, *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165, 174 (1977). For the sake of argument, let us assume that the Puyallup Tribe has adopted a comprehensive zoning ordinance which covers all of the original reservation, both fee and trust land. Under the rule adopted by the Ninth Circuit, the Puyallup Tribe has jurisdiction to zone the 17,978 acres of previously alienated land, including that which is located within the city limits of the City of Tacoma, most of which is within the boundaries of the original reservation. Under *Montana*, if the Tribe were to bring an action to void the city's and county's ordinances as was done here, the court would have to determine, after a long trial, whether the city's and county's laws have any "direct effect on the political integrity, economic security, or health and welfare of the tribe". Whereas, the jurisdictional question would be clear today without a trial if the test were based on land tenure classification.

The same would be true with respect to the Suquamish Indian Tribe, which has alienated 63 percent of a 7,276-acre reservation. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 193 (1978).

It is submitted that unless this court adopts a test based on land tenure classification, the Circuit Courts will be confronted with endless appeals asking to define what "direct effect on the political integrity, the economic security, or the health or welfare of the tribe" means. This is similar to the problem faced by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), when overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court recognized that the "traditional governmental function" test had not worked in that lower courts were reaching opposite conclusions on

the same facts. The same thing is happening with the second part of the *Montana* test.[11]

The test which is suggested would be responsive to the many fact patterns which exist on reservations throughout the United States. It would give the Tribes jurisdiction over their trust lands and, at the same time, would put them on equal footing with all citizens of the United States with respect to their neighbor's land which is controlled by another political subdivision.

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[11] A Ninth Circuit case of particular relevance since it deals with the Yakima Reservation is *Holly v. Totus*, No. 85-4436 (9th Cir.), *cert. denied*, 98 L.Ed.2d 47 (1987), (App. 65-A). In that case, the Court held the Yakima Nation Water Code invalid as to use of excess water by non-Indian fee owners. The Court found that the Tribe had failed to demonstrate that state regulation of such waters threatened or had a direct effect on the political integrity, economic security or health and welfare of the Tribe as required by the *Montana* test. Potentially, then a non-Indian farmer on the Yakima Reservation will be subject to tribal land use regulations and state water use regulations on the same piece of land.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded with directions to enter an order that the County of Yakima possesses exclusive authority to regulate fee land within the reservation. Alternatively, the judgment of the Court of Appeals in *Whiteside II* should be reversed and the case remanded with instructions to enter an order that Yakima County possesses exclusive authority to regulate the use land owned in fee by non-members of the Tribe within the open area of the reservation.

Respectfully submitted,

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Nos. 87-1622, 87-1697, and 87-1711

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,

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v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,

Respondents.

STANLEY WILKINSON,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF PETITIONER PHILIP BRENDALE

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QUESTIONS PRESENTED

1. In 1877, Congress enacted the Dawes Act, 25 USC 331, *et seq.*, and land within the Yakima Indian Reservation was allotted to individual tribal members. The land remained in trust for twenty-five (25) years, then a fee simple patent was issued to the individual Indian allottee free from any encumbrance or restriction on alienability. 25 USC 348. After issuance of a fee simple patent, the allottee was subjected to the civil and criminal laws of the state in which he resided. 25 USC 349.

In 1963, the State of Washington, acting pursuant to Public Law 280 (25 USC 1360) assumed full criminal and civil jurisdiction over reservation land not held in trust for the benefit of individual Indians or the Yakima Nation.

Does the allotment and issuance of a fee simple patent for Petitioner's land within the Yakima Indian Reservation pursuant to 25 USC 331, *et seq.*, together with Washington's further assumption of full criminal and civil jurisdiction over all non-trust land within the Yakima Reservation divest the Yakima Nation of authority to exclusively regulate use or zone land use on Petitioner's deeded, fee-owned, non-trust land within the Yakima Indian Reservation?

2. Does Yakima County exercise of land use-zoning jurisdiction over deeded, fee-owned, non-Indian land including Petitioner-Brendale's proposed subdivision of twenty (20) acres of his deeded, fee-owned, non-trust land (all within the "closed area" of the Yakima Indian Reservation) threaten the political integrity, economic security, general health and welfare of the Yakima Indian Nation?

3. Does subjecting Petitioner's fee simple owned land to Yakima Nation rather than Yakima County land use regulation based on its location within the "closed area" as well as the Yakima Nation's 1955 tribal resolution and the BIA's 1972 "Public Notice" creating the "closed area" violate Petitioner's constitutional due process and equal protection rights?

PARTIES TO THE ACTION

This action (No. 87-1622) (referred to in the Court of Appeals as "*Whiteside I*") involves Petitioner-Philip Brendale, Yakima County, its Commissioners, Jim Whiteside, Graham Tollefson and Charles Klarich, Planning Department Director, Richard F. Anderwald, and the Confederated Bands and Tribes of the Yakima Indian Nation (herein "Yakima Nation").

The case with which this action has been consolidated, *Confederated Bands and Tribes of the Yakima Indian Nation vs. County of Yakima, et al.* (*Whiteside II*), (Nos. 87-1697, 87-1711), involves the Yakima Nation, Yakima County, the Commissioners and Planning Director named above, Stanley Wilkinson, Jim Gatliff and Dick Keller.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE ACTION	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND TREATIES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	11
ARGUMENT	12
THE NINTH CIRCUIT OPINION CONFLICTS WITH THE LAWS AS ESTABLISHED BY CONGRESS AND THE U.S. SUPREME COURT	12
I. Divestiture of Yakima Nation Jurisdiction Over Deeded, Fee-Owned Land Within the Reservation	12
II. The Court of Appeals Failed to Properly Apply the *Montana* Rule	17
III. Violation of Due Process and Equal Protection	26
CONCLUSION	29

TABLE OF AUTHORITIES

Cases: Page

Barrie v. Kitsap County, 93 Wn.2d 843, 613 P.2d 1148 (1980) 21
Chardin v. DeLaCruz, 671 F.2d 363 (9th Cir. 1982) 24
Department of Natural Resources v. Thurston County, 92 Wn.2d 657, 601 P.2d 494 (1979) 21
Hampton v. Mow Son Wong, 426 U.S. 88, 48 L.Ed. 2d 495, 96 S.Ct. 1895 (1976) 27
Knight v. Shoshone & Arrapahoe Tribes of the Wind River Reservation, 670 F.2d 900 (10th Cir. 1983) 24
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 12
Lummi Indian Tribe v. Hallauer, 9 I.L.R. 3025 (W.D. Wash. 1982) 24
Montana v. United States, 450 U.S. 544, 67 L.Ed. 493, 101 S.Ct. 1245 (1981) ..... *passim*
Queets Band of Indians v. State of Washington, 765 F.2d 1399 (9th Cir. 1985) 27
SAVE v. City of Bothel, 89 Wn.2d 862, 576 P.2d 401 (1979) 21
Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987) 14, 18, 19
United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) 20, 24
United States v. Cross, 708 F.2d 631 (11th Cir. 1983) 27
United States v. Payne, 264 U.S. 446, 44 S.Ct. 352 (1924) 12
United States v. Wheeler, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079 (1978) 13
Washington v. Yakima Indian Nation, 439 U.S. 436, 58 L.E.2d 740, 99 S.Ct. 740 (1979) 15, 16, 19, 29

Statutes:

U.S. Constitution, Fifth Amendment 27
U.S. Constitution, Fourteenth Amendment 27
25 USC 331, *et seq.*, The Dawes Act ..... *passim*
25 USC 348 12

TABLE OF AUTHORITIES—Continued

Page

25 USC 349 ..... 12, 14
25 USC 1302(8) 27
28 USC 1360 12
Public Law 280 ..... 11, 14, 15, 25
RCW Chap. 37.12 ..... 11, 12, 14, 15
RCW Chap. 76.08 10

Regulations:

25 CFR 170.8 ..... 3, 5, 6, 27

Other Authorities:

Jurisdiction to Zone Indian Reservations, 53 Wash. L.Rev. 677 (1978) 19

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONER PHILIP BRENDALE

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals was filed September 21, 1987, is reported in 828 F.2d 529 and is printed in the "Appendix to Petition for Writ of Certiorari" of Philip Brendale (herein "BA") 1-39. Timely Petitions for Rehearing by Petitioner-Brendale (*Whiteside I*) and Yakima County (*Whiteside II*) were denied by "Order" filed 1/13/88 (BA 217). The Decision of the District Court, entered September 11, 1985, is reported in 617 F.Supp. 735 (BA 64-128).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 USC 1254 and Rule 17.1 of this Court. Brendale's Petition for Certiorari was timely filed on 3/31/88 and granted on 6/20/88.

STATUTES AND TREATIES INVOLVED

1. U.S. Constitution, Fifth Amendment, "Petition for Writ of Certiorari" of Philip Brendale (herein BP) p. 2.

2. U.S. Constitution, Fourteenth Amendment, Section 1, BP 2.

3. 25 USC 348, BA 219.

4. 25 USC 349, BA 227.

5. 25 USC 1302(8), BP 3.

6. Public Law 280, Section 6, Act of August 15, 1953, 67 Stat. 590, 28 USC 1360, BA 230.

7. RCW 37.12.010, BA 235.

8. Treaty with the Yakimas, BA 237.

9. 25 CFR 170.8, BP 4.

STATEMENT OF THE CASE

Petitioner-Philip Brendale (herein "Brendale" or "Petitioner") is the fee owner of 160 acres of real property situate in Yakima County, Washington, and located within the exterior boundaries of the Yakima Indian Reservation. Brendale's land was on 6/15/15 allotted pursuant to 25 USC 331, *et seq.*, to his great-aunt, Margaret Smith, an enrolled Yakima Indian. (EX 201)

When Margaret Smith died, the allotment passed to Brendale's grandfather, Morris Charles, and his mother, Carolyn Charles, each with an undivided one-half interest as tenants-in-common. Both Morris and Carolyn Charles were enrolled members of the Yakima Nation. (R 692) On 7/13/63, the United States issued an unrestricted, unencumbered fee simple patent to Morris and Carolyn Charles (EX 202).

Following the deaths of Morris and Carolyn Charles, Brendale inherited the entire 160 acres in unrestricted, unencumbered fee simple. (R 693). Although Petitioner is a direct descendant of enrolled Yakima Indians, he is not an enrolled member of the Yakima Nation and, therefore, has no voice or vote in the Yakima Nation Tribal government.

Brendale's property is located within a portion of the Yakima Indian Reservation which was, contrary to 25 CFR 170.8 and without notice or due process to fee land owners, "closed" to unenrolled members of the Yakima Nation by a 1955 tribal resolution, a 1972 U.S. Bureau of Indian Affairs (herein "BIA") "Public Notice" (EX 204, R 705), and the Yakima Nation's 1972 "Amended Zoning Regulations", Section 23 (EX 6).[1]

---

[1] The invalidity of the road closure was recently affirmed by the Department of Interior's 4/08/88 "Letter Decision on Appeal of Portland Area Director's Decision Affirming the Yakima Agency Superintendent's Denial of Application by Philip Brendale, Gary Gwinn and Larry Boyd for permits to use BIA roads", printed in the Appendix, pp. 1a-5a.

The "Amended Zoning Regulations", Section 23, establishes the "reservation restricted area" in which permanent structures, except tribal camps for education and recreation of tribal members and structures constructed and occupied by the Yakima Nation or BIA in furtherance of tribal resources are purportedly prohibited.

The Yakima Indian Reservation "closed area" is located in both Klickitat and Yakima Counties and consists of approximately 807,000 acres of the 1.3 million acre reservation. Approximately 35,000 acres of the "closed area" are owned in fee simple by non-Indians and Indians and the remainder is held in trust by the United States for individual Indians and the Yakima Nation. The "closed area" *in Yakima County* contains approximately 740,000 acres of which 25,000 acres are fee simple land. (1/25/84 Deposition of Henry Williams, p. 9.)

In approximately 1900, land which the BIA and Yakima Nation has included in the "closed area" of the reservation was outside the then-established Yakima Indian Reservation boundary and was extensively homesteaded by non-Indian settlers who constructed permanent dwellings on their fee simple property. Many of these permanent dwellings are located in "Cedar Valley" near the land now owned in fee simple by Brendale (R 701, 703-705, EX 203).

Contrary to the District Court's findings, there are more than twenty (20) permanent structures in the closed area consisting of cabins and related out-buildings which are *not* associated with tribal camps or resource management. At least three (3) structures are used for private commercial enterprises, one structure is owned and occupied by a non-tribal member who acquired the property after enactment of the 1972 "Amended Zoning Ordinance" and at least one cabin has been rebuilt after being destroyed by fire after enactment of the ordinance,

all contrary to the "Amended Zoning Ordinance". (JA 24-25)

In addition, there is a 50-lot subdivision located within the closed area in which at least five (5) mobile homes have been placed after enactment of and in violation of the "Amended Zoning Ordinance" without objection from the Yakima Nation. (JA 25, EX "B" to D 143)

Since the 1940's, substantially all the forest in the reservation "closed area" has been commercially logged (R 54). Most of the timber producing land has been logged twice; some areas are being cut for the third time. (EX 228, 229, 230, 240).

The Yakima Nation's intensive, recurring commercial logging in the "closed area" surrounding Brendale's land has been routinely conducted without any previously expressed Indian concern about religious or cultural values.

In 1972, the BIA "Public Notice" (EX 204) improperly and contrary to 25 CFR 170.8, the Dawes Act and constitutional due process, closed all roads in the reservation forest area, except U.S. Highway 97, to all persons except enrolled members of the Yakima Tribe.

The notice provided the tribal council could first issue a "permit", then the BIA superintendent could issue "closed area entry permits" to non-enrolled members of the tribe: (1) doing business with the tribe, or (2) who on 5/02/72 owned land in the "closed area".

After Brendale inherited the property from his mother in June, 1972, he continued to use the BIA roads which were constructed and maintained with money from the U.S. General Treasury as he had in the past for access to his deeded property without applying for a permit, believing he had an absolute right of access, ingress and egress to his fee simple land.

In 1974, the United States filed suit against Brendale in *United States v. Brendale*, E.D. Wash. Civil No. 74-179. On 9/30/77, the District Court granted a perma-

nent injunction prohibiting Brendale's use of BIA roads without a permit. In 1977, Brendale was advised by the BIA superintendent anyone who purchased Brendale's property within the "closed area" would not be issued "entry permits" because they were not record owners of the land when the 1972 BIA "Public Notice" was issued and the 1972 tribal zoning ordinance enacted.

In 1978, Brendale filed suit in the U.S. District Court (*Brendale v. Olney,* C-78-145), to establish the right of his grantees, heirs, successors and assigns to have unlimited access to his "closed area" fee simple land.

On 3/03/81, a District Court "Memorandum Decision and Judgment" (EX 205) was entered finding an implied easement for access over the "closed" BIA roads, prohibiting the superintendent of the Yakima Indian Reservation from interfering with access to Brendale's property and granting Brendale, his invitees, successors and assigns in interest the absolute right to use BIA roads for access to Petitioner's land limited only if the conditions described in 25 CFR 162.8 (now 25 CFR 170.8) existed when restricted road use would be equally applied to all persons, including enrolled members of the Yakima tribe.

In 1981, Brendale advised the Yakima Nation he intended to sell his property to others unless it was purchased by the tribe and when no offer was received, advised the Yakima Nation he intended to plat his property for sale as mountain recreation homesites. (EX 206, 207)

In late January, 1982, Brendale filed four contiguous 40-acre short plat (subdivision) applications with the Yakima County Planning Department together with the "Environmental Checklist" required by Yakima County subdivision ordinance (EX 211, R 542-543).

Yakima County has historically exercised exclusive subdivision, land use jurisdiction over non-restricted, non-trust, fee-patent land such as Petitioner's within the

exterior boundaries, including the "closed area" of the Yakima Indian Reservation. (R 473-477, 563). The Yakima Nation did *not* in 1982 and at present does not have any regulations or procedure for subdividing (platting or short-platting) real estate. (R 136, 498-499).

The Yakima County Planning Department issued a proposed "Declaration of Non-Significance" of Brendale's short plats which was mailed to and received by the Yakima Nation Tribal Council together with the "Environmental Checklist", a map showing the location of the short plat, and a request the Yakima Nation provide the Yakima County Planning Department with its comments on the Environmental Checklist, proposed "Declaration of Non-Significance" and short plat. (R 542-543)

Yakima County received *no* comments or suggestions from the Yakima Nation about Appellant's four short plats. (R 542-543, EX 211, 212) The Environmental Checklist sent to the Yakima Tribal Council clearly indicated Appellant's eventual, intended use of the short platted land was to develop recreational homesites.

In March, 1982, Brendale advised the Yakima Nation of his completed short plats and intent to proceed with subdivision sales for development since the tribe did not appear interested in purchasing Brendale's property. Brendale then received a BIA offer to purchase his land for less than twenty percent (20%) of its fair market value. (EX 208, 209) Brendale submitted a counter-offer to the BIA and then received a letter from the Yakima Nation raising for the first time land use limitations contained in tribal zoning regulations. (EX 210)

In April, 1983, Brendale filed an application with Yakima County to subdivide twenty (20) acres of his property into ten (10) two-acre lots. Brendale proposed use of the lots for recreational cabins and travel trailer sites. (EX 122)

The filing of Brendale's subdivision application with Yakima County and Yakima County's assumption of jurisdiction to consider the application triggered this litigation.

The Yakima County Planning Department determined Brendale's proposed subdivision would *not* have a significant adverse effect on the forest environment in which the property was located and issued a "Declaration of Non-Significance" (EX 123).

The Yakima Nation appealed the Planning Department's "Declaration of Non-Significance" to the Yakima County Commissioners. After considering the Yakima Nation's contention Yakima County did not have jurisdiction to subdivide Appellant's fee land, the Commissioners (who are also defendants in this litigation) received testimony on the merits of the need for an Environmental Impact Statement.

On 8/16/83, after four (4) days of hearings, the Commissioners entered "Findings of Fact, Conclusions of Law and Order of Yakima County Commissioners" (EX 7) overruling the Planning Department's "Declaration of Non-Significance" and requiring the preparation of an Environmental Impact Statement for Brendale's plat application.

The Yakima Nation filed its Complaint in the District Court. After a hearing, the District Court granted a temporary restraining order on 9/22/83 (D 12), and orally granted a preliminary injunction on 10/17/83. The District Court's "Memorandum and Order Granting Preliminary Injunction" was entered 11/16/83. (D 42) The case was set for an expedited trial on the merits and tried between 1/30/84 and 2/02/84.

"Environmental assessments" (herein "EA") by the BIA were conducted for three (3) large Yakima tribal commercial timber sales close to Brendale's land in the early 1980's. (EX 232, 233 and 234)

The EA's concluded intensive logging in the area would have *no* significant effect on the environment even though the logging would involve the construction of new roads, use of heavy equipment, logging operations and substantial slash burning in the closed area. The EA's disclosed no sites of specific religious or cultural significance to the Yakima Nation or its members which would be impacted by the tribe's intensive logging operations. One of the EA's disclosed the existence of the partially developed "Olney Creek Campground" in the sale area and acknowledged the asphalt paved Signal Peak Road (which provides access to Petitioner's land) was already receiving heavy use. (EX 234, p. 2). Another EA acknowledged use of roads to be constructed within the sale area after the timber was logged might have a negative effect on some use of the area by elk herds. The EA did not, however, consider the effect on elk herds significant. (EX 233, p. 2). Although there was testimony at trial road use associated with Brendale's development might have some effect on deer and elk herds in the area, no evidence was presented the effect would be any greater than current substantial traffic from logging, enrolled tribal members and permittees presently using the same roads which provide access to Brendale's property. (R 407, 411-412) The Yakima Nation's witnesses testified about prospective harassment of game animals by Brendale's purchasers and their pets. Tribal members currently bring to the "closed area" dogs which are allowed to run free (R 737). Members also hunt both deer and elk all year (R 792). The adverse effect of pets owned by enrolled members and their guests currently admitted throughout the "closed area" and the year-round tribal deer and elk hunting is obviously greater than would result from people and pets on Brendale's proposed development which would be confined to their land and would have no hunting privileges.

The Yakima Nation's primary concern about Petitioner's proposed development is a prospective increase of

fire danger to the timber producing area. It was acknowledged, however, fires built by users of Brendale's development would be much less a threat to the surrounding forest than open fires in campgrounds or fires by Yakima Nation members camping outside established campgrounds. (Williams deposition, p. 53).

Evidence was also submitted about potential introduction of noxious weeds by users of Brendale's proposed development which might adversely affect timber, traditional herbs and plants (R 70). The substantial potential for introduction of noxious weeds already exists, however, because the Yakima Nation and BIA permit summer and fall grazing within the "closed area" of 7,000-8,000 head of cattle (R 259) which winter in areas containing noxious weeds (R 195-196). Hay, which was described as a major source of noxious weeds, is currently brought into the "closed area" by enrolled Indians and other permitted users (R 736). The danger of noxious weeds from activities currently permitted by the Yakima Nation and BIA indicates the potential noxious weed danger posed by users of Brendale's proposed development is insignificant.

Before Brendale's plat application and this litigation, the State of Washington and Yakima County have also exercised exclusive jurisdiction of fee land within the "closed area" through the Washington State Forest Practices Act (RCW Chap. 76.08), issuing permits for timber harvesting, chemical application, removal of forest debris, replanting and removal of land from forest management (R 605-607).

The State also imposes a "forest patrol tax" on fee land within the "closed area" which is collected by Yakima County for fire suppression on fee land within the "closed area". (R 611, EX 225).

Both the BIA and Respondent-Yakima Nation have acknowledged they have no jurisdiction over, and have not attempted to control, timber management and other

logging activities on fee land within the "closed area" of the Yakima Reservation (R 184; Williams deposition, p. 59-71).

Washington State and Yakima County real property and other taxes area assessed against the fee land in the "closed area", paid by Brendale and other fee owners and collected by Yakima County (EX 225).

SUMMARY OF ARGUMENT

1. The restriction of tribal sovereignty by treaty, statute and the tribe's dependent status, Congressional enactment of the Dawes Act, and Public Law 280, together with Washington State's enactment of RCW Chap. 37.12 assuming civil and criminal jurisdiction over non-trust fee-owned land within the Yakima Indian Reservation has completely divested the Yakima Indian Nation of jurisdiction over fee land within the reservation and vested completed, exclusive jurisdiction over non-Indian fee land in Washington State and its political subdivisions.

2. Yakima County's regulation of land use on non-trust, fee-owned land within the Yakima Indian Reservation does not threaten or have any direct effect on the political integrity, economic security, health or welfare of the Yakima Indian Nation.

3. Imposition of tribal land use jurisdiction based on the location of non-trust, fee-owned land within either the "open area" or the arbitrarily created "closed area" of the Yakima Indian Reservation is not rationally related to the preservation of the Yakima Nation's political integrity, economic security, health or welfare and results in a violation of Petitioner's and other closed area fee land owners constitutional right to equal protection as well as an unconstitutional deprivation of property without due process or compensation.

ARGUMENT

THE NINTH CIRCUIT "OPINION" CONFLICTS WITH THE LAW AS ESTABLISHED BY CONGRESS AND THE U.S. SUPREME COURT.

I. Divestiture of Yakima Nation Jurisdiction Over Deeded, Fee-Owned Land Within the Reservation.

It is undisputed Congress has the power to unilaterally limit or abrogate treaties with Indian tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

Congress has, in the exercise of its power over Indian tribes and treaties, terminated the exclusive nature of the Yakima Reservation and authorized the State of Washington to assume civil and criminal jurisdiction over fee simple, non-trust land within the reservation. (28 USC 1360)

With its assumption of jurisdiction over all non-trust, non-restricted land in the Yakima Indian Reservation in 1963 pursuant to RCW Chap. 37.12, the State of Washington's jurisdiction over non-trust land within the reservation became complete and exclusive.

In 1877, Congress enacted the Dawes Act (25 USC 331, *et. seq.*) and land within the Yakima Indian Reservation was allotted to individual tribal members. The Dawes Act is applicable not only to agricultural and grazing land but also timber land now owned by Brendale. *United States v. Payne*, 264 U.S. 446, 44 S.Ct. 352 (1924). The land remained in trust for twenty-five (25) years, then a fee simple absolute patent was issued to the individual Indian allottee without any encumbrance or restriction on alienability (25 USC 348). After a fee simple patent was issued to an Indian, the Indian was subjected to the civil and criminal laws of the state in which he resided (25 USC 349).

The land which is the subject of this case was initially allotted to Petitioner's great-aunt, an enrolled Yakima

Indian, and the fee simple patent in the land was issued to Petitioner's grandfather and mother, all pursuant to the Dawes Act.

In *Montana v. United States*, 450 U.S. 544, 67 L.Ed. 2d 493, 101 S.Ct. 1245 (1981), this Court specifically recognized Congress's intent to eliminate tribal jurisdiction over land patented pursuant to the Dawes Act, stating at Note 9, 450 U.S. 559-560:

* * * *

> "There is simply no suggestion in the legislative history that Congress intended that the non-Indians who have settled upon alienated allotted lands *would be subject to tribal regulatory authority.* Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction . . . *it defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction* when an avowed purpose of the allotment policy is the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined the purpose if peaceful assimilation could be advanced if freeholders could be excluded from fishing or hunting on their acquired property." (Emphasis added)

* * * *

Although Indian tribes possess "inherent sovereignty", their sovereignty has been substantially restricted and limited by treaty, statute and the tribe's dependent status.

In *United States v. Wheeler*, 435 U.S. 313, 326, 55 L.Ed.2d 303, 98 S.Ct. 1079 (1978), this Court discussed and distinguished the inherent powers which tribes have retained and those which have been divested, stating:

* * * *

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving relations between an Indian tribe and non-members of the tribe . . . .

"These limitations rest on the fact that the dependent status of the Indian tribe within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. The powers of self-government, including the power to prescribe and enforce internal criminal laws are of a different type. They involve only the relations of members of the tribe. Thus they are not such powers as would necessarily be lost by virtue of the tribe's dependent status." (Emphasis added)

* * * *

The Ninth Circuit has recognized land within an Indian reservation for which a fee simple patent has been issued is subject to state and municipal regulation.

In *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987), the District Court held city rent control regulations could be applied to Indian land because the trust patents issued for the land would expire in 1986 and the land would become subject to all California laws pursuant to 25 USC 349.

The Ninth Circuit recognized the effect of 25 USC 349 but since the Secretary of Interior had extended the trust status to 1989, and held the land was still in trust and was not, therefore, subject to city regulatory ordinances.

Although RCW Chap. 37.12 enacted pursuant to Public Law 280 did not expressly grant the State of Washington specific zoning jurisdiction over fee-patent land within the Yakima Reservation, land use jurisdiction had been previously acquired when fee patents were issued pursuant to 25 USC 349; enactment of RCW Chap. 37.12 formalized the State's zoning jurisdiction of reservation fee patent land as complete and exclusive.

The State's complete jurisdiction of fee simple, non-Indian owned land within the Yakima Reservation for all purposes including zoning was explicitly recognized by this Court in *Washington v. Yakima Indian Nation*, 439 U.S. 463, 498, 499, 58 L.Ed.2d 303, 99 S.Ct. 740 (1979):

* * * *

"State jurisdiction is complete as to all non-Indians on reservations and is also complete as to Indians on non-trust lands.

. . . * * * *

"The state has accepted the jurisdiction offer in Public Law 280 in a way that leaves substantial play for tribal self-government, under *a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within the reservation*, has plainly taken action within the terms of the offer made by Congress to the states in 1953." (Emphasis added).

* * * *

The Ninth Circuit clearly failed to recognize or even consider Washington State's assumption of civil jurisdiction pursuant to Public Law 280 and RCW Chap. 37.12 as being the final step in the divestiture of *all* tribal jurisdiction over deeded, non-Indian, non-trust, fee land within the Yakima Reservation consistent with the clearly expressed Congressional intent of the Dawes Act and Public Law 280.

The failure of the Ninth Circuit to accept the divestiture of the tribal zoning jurisdiction over non-trust, non-restricted fee simple land within the Yakima Reservation and resulting exclusive jurisdiction of Washington State and its political subdivision, is contrary to and a fundamental departure from the express, unambiguous holdings of this Court in *Washington v. Yakima Indian Nation*, *supra*, and *Montana v. U.S.*, *supra*.

This Court should reaffirm the allocation of jurisdiction over land within the Yakima Reservation based on whether the land is owned in fee or owned by or held in trust for the Yakima Indian Nation is a reasonable and appropriate method of accommodating the needs and rights of non-Indians within the reservation while at the same time recognizing and preserving tribal sovereignty and control over trust or tribal owned land as recognized in *Washington v. Yakima Indian Nation, supra.*

The application of land use jurisdiction based on land ownership eliminates any uncertainty about which sovereign has jurisdiction and further eliminates the need to make jurisdictional determinations on a case by case basis.

In addition, jurisdiction based on land ownership is consistent with the Dawes Act Congressional intent non-Indian landowners will be subject to state, *not* tribal authority, and also recognizes and preserves the non-Indian landowner's right to have a voice in the government which regulates his land and his activities on the land.

Land use jurisdiction based on land ownership is also consistent with preservation of the Yakima Nation's sovereignty and control over its own land. As pointed out below, the Washington State Environmental Policy Act requires land use decisionmakers consider and accommodate concerns of adjacent jurisdictions which may be affected by land use decisions. This requirement insures Yakima land use decisions will *not* be a threat to or adversely affect the Yakima Nation's political integrity, economic security, health or welfare.

The Ninth Circuit Opinion should be reversed and the Court should hold the State of Washington and Yakima County have exclusive land use jurisdiction over non-trust, non-tribal owned, fee land within the Yakima Indian Reservation.

II. The Court of Appeals Failed to Properly Apply the *Montana* Rule.

The Court of Appeals held the Yakima Nation had authority to regulate non-Indian land use of deeded, non-trust, non-tribal owned land within the Yakima Reservation. The Ninth Circuit holding is a misapplication of the test enunciated by this Court in *Montana v. United States, supra.*

In *Montana*, this Court recognized an Indian tribe's dependent status eliminated many attributes of tribal sovereignty, stating at 450 U.S. 563-564:

* * * *

> "This Court most recently reviewed the principals of inherent sovereignty in *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079. In that case, holding that Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory', Id. at 323, 55 L.Ed.2d 303, 98 S.Ct. 1079, the court upheld the power of the tribe to punish tribal members who violate tribal criminal laws. But the court was careful to note that, through their original incorporation into the United States as well as through the specific treaties and statutes, Indian tribes have lost many of the attributes of sovereignty. Id., at 326, 55 L.Ed.2d 303, 98 S.Ct. 1079. The court distinguished between those inherent powers retained by the tribes and those divested:
>
> " 'The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the *relations between an Indian tribe and non-members of the tribe.* These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations.* But the powers of self-government, including the power to prescribe and enforce internal criminal laws are of a different

type. They involve *only the relations among members of a tribe.* Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.' Ibid. (Emphasis by the Court).

"Thus, in addition to the power to punish tribal offenders, the Indian tribes retained their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. Id. at 322, n. 18, 55 L.Ed.2d 303, 98 S.Ct. 1079. *But the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes,* and so cannot survive without express congressional delegation. (Citations omitted)." (Emphasis added)

The *Montana* Court noted two (2) factual settings in which an Indian tribe may retain the power to exercise *limited civil jurisdiction* over non-Indians on fee land within the reservation. The first, *which is not applicable in this case,* exists if non-Indians enter consensual relations with the tribe or its members. The second exists if conduct of non-Indians on fee-land threatens or has some direct effect on the political integrity, economic security, health or welfare of the tribe. *Montana v. United States,* 450 U.S. 565-566.

The Court of Appeals in both this case and *Whiteside II* improperly found denial of tribal zoning jurisdiction of non-Indian, "closed area" fee land would threaten or directly affect the tribe's health or welfare.

The Ninth Circuit erroneously relied in part on *Segundo v. City of Rancho Mirage, supra,* at p. 1393, stating: ". . . land use regulation is within the tribe's legitimate sovereign authority over its lands".

Segundo involved, however, *only trust land, not non-Indian, fee simple land.*

Although an Indian tribe's retained sovereign authority may include zoning jurisdiction *of trust land, Montana* clearly established a tribe has no jurisdiction over activities on non-Indian fee land unless one of the *Montana* exceptions exists.

Ninth Circuit application of *Segundo* to this case is plain error, clearly contrary to and in direct conflict with the U.S. Supreme Court's holding in *Montana.*

The Court of Appeals also erroneously relied on *Jurisdiction to Zone Indian Reservations,* 53 Wash.L.Rev. 677 (1978), a *Comment* written *before* this Court's decisions in *Washington v. Yakima Nation, supra,* and *Montana v. United States, supra.*

The *Comment* theme is: checkerboard jurisdiction resulting from denial of a tribe's exclusive jurisdiction to zone fee land within the reservation is undesirable and unwise.

In *Washington v. Yakima Indian Nation, supra,* this Court recognized checkerboard jurisdiction as the *only* method of harmonizing a tribe's limited sovereign authority with the rights and interests of non-Indians and states. *Washington v. Yakima Indian Nation, supra,* 439 U.S. 499, 502.

The appropriate *Montana* test to determine if Congress intended the tribe to retain sovereignty to zone fee land within the reservation is: whether or not Yakima County regulation of reservation fee land would in fact threaten or directly affect the Yakima Nation's political integrity, economic security, health or welfare.

Contrary to the Ninth Circuit's "Opinion", application of the second *Montana* exception is *not* resolved by considering whether or not "good land use planning practices" make it desirable for the tribe to have zoning jurisdiction over all land within the reservation.

The Ninth Circuit has previously acknowledged and correctly applied the *Montana* test in *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

In *Anderson*, the issue was: Did Washington State or the Spokane Tribe have the authority to regulate water rights on fee land within the reservation? The *Anderson* Court concluded the tribe had no water right jurisdiction on fee land because the *Montana* exceptions were inapplicable, stating at 736 F.2d 1365:

* * * *

> "We find no *conduct which so threatens or has such a 'direct effect* on the political integrity, the economic security or the health or welfare of the tribe' as to confer tribal jurisdiction". (Emphasis added)

* * * *

Before the Yakima Nation can regulate or zone the use of Petitioner's fee land, there must be facts in the record to sustain a finding Petitioner's development and land use permitted by and subject to Washington State statute and Yakima County regulations, are a substantial threat or have a substantial direct, adverse effect on the tribe's political integrity, economic security, health or welfare. *Some intrusion on tribal interests or speculative impacts are not sufficient. United States v. Anderson, supra*, at 1336.

Yakima County land use regulations include the Washington State Environmental Policy Act, the county subdivision ordinance, zoning code and shoreline (wetland) master plan. It is clear reservation fee land development and use *subject to county regulation and state statute* are *not* a significant threat and will *not* have a significant direct or adverse effect on the Yakima Nation's political integrity, economic security, health or welfare.

The Yakima Nation initially appealed the Yakima County Planning Department's "Declaration of [Environmental] Non-Significance" of Petitioner's plat application to the Yakima County Board of Commissioners.

A hearing by the Commissioners identified fourteen (14) *potential* environmental questions (EX 7). The County Commissioners required Petitioner prepare an "Environmental Impact Statement" before County consideration of Petitioner's plat application.

The County Commissioners' findings of "potential" environmental impact were erroneously adopted by the District Court as evidence Petitioner's proposed development threatened or adversely affected tribal interests. (9/11/85 Memorandum Opinion, *Whiteside I*, BA 83-93; 2/04/84 Oral Opinion, *Whiteside I*, BA 52.)

The Commissioners' findings of "potential" impact cannot, however, be the basis for finding the Yakima Nation's interests are threatened or affected by development conducted *in compliance with county and state land use regulations.*

The Commissioners' hearing and findings unequivocally establish Petitioner's compliance with county regulations and procedures will prevent adverse impact or effect on tribal interests by development of fee land within the reservation.

Before any development, Petitioner must not only comply with the county zoning, subdivision and wetland codes but also state statutes and regulations requiring preservation of environmental, social and economic values. *Department of National Resources v. Thurston County*, 92 Wn.2d 657, 663-665, 601 P.2d 494 (1979); *Barrie v. Kitsap County*, 93 Wn. 843, 858-860, 613 P.2d 1148 (1980).

Action by Yakima County approving Petitioner's proposed development without consideration and adequate investigation of any adverse effects on the Yakima Indian Nation would be arbitrary, capricious and invalid. In *SAVE v. City of Bothel*, 89 Wn.2d 862, 869, 870, 576 P.2d 401 (1979), the Court held a rezone affecting several jurisdictions to be invalid and stated:

* * * *

"Where the potential exists that a zoning action will cause a serious environmental effect outside jurisdiction borders, *the zoning body must serve the welfare of the entire affected community.* If it does not do so it acts in an arbitrary and capricious manner.

* * * *

"The action was arbitrary and capricious in that it failed to serve the welfare of the community as a whole. Specifically, adverse environmental effects and potentially severe financial burdens on the affected community have been completely disregarded. If it is possible to mitigate or avoid adverse environmental effects and if Bothell takes the necessary steps to do so, responsible planning for the shopping center may be reasonable. It has not acted to avoid these consequences, however, and the rezone cannot be sustained." (Emphasis added)

Washington State law clearly requires Yakima County to consider the Yakima Nation's land use policies and classifications and absolutely eliminates the possibility County land use decisions will threaten or adversely affect the Tribe's political integrity, economic security, health or welfare.

The Tribe's ability to protect its interests through State mandated procedures and, if necessary, by resort to the Federal Courts is amply demonstrated by this case. Brendale and other non-Indian landowners within the reservation have no recourse from adverse tribal land use decisions.

The Court of Appeals also erroneously failed to consider the extensive past history of county and state regulation of fee land in the reservation.

If the tribe and other parties previously acquiesced in and accepted non-Indian regulation of fee land within the reservation, there is no threat or direct effect on tribal self-government or other interests. See: *Montana v. United States, supra,* 450 U.S. 554, Fn. 13.

Yakima County and Washington State have exercised exclusive jurisdiction over land use on fee land within the reservation closed area, including Petitioner's property, before this case and *Whiteside II* were filed. In 1982 Yakima County accepted, processed and approved four (4) contiguous short plats of Petitioner's property.

The Yakima Nation did *not* object to Petitioner's short plat or county jurisdiction over Petitioner's proposal although Yakima Nation had notice of Petitioner's application, his future plans for the property and the County's "Declaration of Non-Significance".

In addition, timber production, the primary use on fee land within the reservation closed area, has been exclusively regulated and controlled by the Washington State Forest Practice Act and administrative regulations. State permits for timber cutting, chemical applications, removal of forest debris and forest practices which involve water affecting fish have been routinely required and issued by Washington State. Fee land within the timbered portion of the closed area is also subject to a "forest patrol tax" collected by Yakima County for fire suppression and control.

In this case, as in *Montana,* Washington State and Yakima County's previous, exclusive regulation of reservation closed area fee simple land and the tribe's long acquiescence in and acceptance of state and county regulation clearly establishes Yakima County's exercise of land use jursidiction on reservation fee land has not in the past and will not in the future threaten or directly affect the Yakima Nation's political integrity, economic security, health or welfare.

Other cases in which an Indian tribe has been found to have authority to impose restrictions on fee land within a reservation do *not* provide any support for the Ninth Circuit's conclusion the Yakima Nation should have zoning jurisdiction of fee land in this case.

In *Knight v. Shoshone & Arapahoe Tribes of the Wind River Reservation*, 670 F.2d 900 (10th Cir. 1983), neither the state nor county involved asserted or exercised land use jurisdiction within the exterior boundaries of the reservation. The tribe's zoning ordinance was the *only* land use regulation which controlled development on the reservation. The Court found "unregulated development" would directly affect tribal and allotted land and permitted the tribe's enforcement of its zoning ordinance on reservation fee land.

In *Chardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982), the Court not only found the non-Indian landowner was engaged in "consensual" relations with the tribe through commercial dealing, but also found the non-Indian landowner's violation of the tribal building and health regulations substantially and directly affected the tribe's health or welfare. Again, as in *Knight, supra*, there is no indication there existed state or county regulation of the *Chardin* landowner's business.

In *Lummi Indian Tribe v. Hallauer*, 9 I.L.R. 3025 (W.D. Wash. 1982), the Court specifically held the lack of adequate reservation sewer system regulation had the potential for significantly affecting the economy, health and welfare of the tribe and authorized the tribe to require non-Indians to hook up to the tribe's sewer system. There is absolutely no evidence in *Lummi* the state or county had exercised land use jurisdiction of reservation fee land.

In this case, as in *Montana v. United States, supra*, and *United States v. Anderson, supra*, Yakima County's regulation of fee land within the exterior boundaries of the Yakima Reservation and Petitioner's proposed development of his fee simple property *in compliance with and subject to county and state regulations* pose no direct threat to or effect on the Yakima Nation's political integrity, economic security, health or welfare sufficient to

confer tribal zoning jurisdiction on non-Indian fee simple land.

Yakima County's assertion and exercise of land use jurisdiction over Petitioner's fee land within the Yakima reservation is, like Washington State's 1963 assumption of jurisdiction over reservation fee land pursuant to PL 280, a responsible accomodation of both Indian and non-Indian rights within the reservation consistent with this Court's prior decisions, providing state and county protection and services to non-Indian citizens living within the reservation who have no voice in tribal government but at the same time deferring to and not interfering with tribal self-government on trust or restricted land.

The Trial Court in *Whiteside II* correctly found "checkerboard" zoning and appropriate multi-jurisdictional zoning are required by today's society, whether it involves counties, cities, towns or Indian tribes. (6/08/84 Oral Opinion, *Whiteside II*, BA p. 154.)

The imposition of tribal land use-zoning regulation on reservation fee land pursuant to the Court of Appeals' "Opinion" is not necessary to serve or protect legitimate tribal interests which are not already served and protected by state and county regulation.

On the other hand, the Yakima Nation "closed area" zoning regulations approved by the Ninth Circuit destroy existing comprehensive county-state land use programs which are responsive to and accommodate both tribal and non-Indian interests.

Section 8 of the "Amended Zoning Regulations of the Yakima Indian Nation" establishes the Yakima Tribal Council as the "Board of Adjustment" to review decisions of the zoning administrator. A party aggrieved by a tribal council decision *has no right to have the decision reviewed.* Section 10 of the "Amended Zoning Regulations" entitled "Appeals from the Board of Adjustment", provides:

"Nothing in this ordinance shall be construed to be a waiver of sovereign immunity by the Yakima Nation, and its officers and agents."

Exclusive tribal zoning jurisdiction would also, therefore, subject non-Indian citizens and landowners on the reservation to regulation by a tribal government in which they are prohibited from participation and to adverse decisions from which there is no judicial review.

Such exclusive and uncontrolled power by the Tribe over non-Indian fee land is subject to abuse by the tribal government, a fact demonstrated by the Yakima Nation's unreasonably low offer to purchase Brendale's property based on the land use limitations imposed by the Tribe's zoning regulations (EX 210).

Proper application of *Montana* requires reversal of the Ninth Circuit and the determination Brendale's property is subject to the exclusive jurisdiction of Washington State and Yakima County.

III. Violation of Due Process and Equal Protection.

The District Court's decision in this case (*Whiteside I*) and its later decision in the companion, consolidated *Whiteside II* case erroneously create two (2) classes of fee simple land owners within the exterior boundaries of the Yakima Reservation based on location of land without a reasonable basis for the classification.

The Court of Appeals also discussed and decided the issue of exclusive Yakima Nation zoning jurisdiction based on an unconstitutional classification of land in the reservation "open" and "closed" areas holding the Yakima Nation has exclusive jurisdiction of the "closed" area and remanding the issue of Yakima Nation's exclusive zoning jurisdiction in the "open" area to the District Court for additional findings of fact.

Creation of the "closed area" by 1955 tribal resolution, 1972 BIA "Public Notice" contrary to 25 CFR 170.8 and perpetuation of it by Yakima Nation's 1972 zoning ordinance are also an unconstitutional, unlawful deprivation of Petitioner and other fee owners' due process, equal protection and just compensation rights.

The District Court and Ninth Circuit Court of Appeals have erroneously adopted in *Whiteside I and II* the Yakima Nation and BIA's previous unlawful acts creating unconstitutional classification and have erroneously affirmed their violation of Petitioner's due process, equal protection and just compensation rights.

The Fifth Amendment of the U.S. Constitution imposes the requirement of providing equal justice and law on the federal government; it subjects federal actions to the same requirements imposed on the states by the Fourteenth Amendment equal protection clause. *Hampton v. Mow Son Wong*, 426 U.S. 88, 48 L.Ed.2d 495, 96 S.Ct. 1895, 1903-1904 (1976).

The Fifth Amendment equal protection requirements apply to federal court acts and decisions. See: *United States v. Cross*, 708 F.2d 631 (11th Cir. 1983). Tribal acts and decisions are also subject to the same standards pursuant to the Indian Civil Rights Act, 25 USC 1302(8).

To satisfy equal protection requirements, different classifications of similarly situated persons and land must bear a rational relationship to a legitimate government objective. See: *Queets Band of Indians v. State of Washington*, 765 F.2d 1399 (9th Cir. 1985).

The District Court in this case (*Whiteside I*) determined "closed area" fee owned land was subject to the Yakima Nation's exclusive zoning jurisdiction. The District Court later held in *Whiteside II* "open area" fee land within the exterior boundaries of the reservation but outside the "closed area" was subject to Washington State and Yakima County's exclusive zoning jurisdiction.

In both cases, the apparent governmental objective was the preservation of the Yakima Nation's political integrity, economic security, health and welfare.

No evidence was introduced in this case to show how the boundary of the "closed area" was established or what relation, if any, the boundary of the "closed area" had to preservation of the Yakima Nation's political integrity, economic security, health or welfare.

The classification of fee owned land based on its geographic location inside or outside the "closed area" of the reservation is not, however, rationally related to the stated objective.

The District Court subjected Petitioner's property and other reservation "closed area" fee land to the Yakima Nation's zoning jurisdiction "to preserve the area's religious and cultural significance".

The Yakima Nation's archeologist testified about 62 sites of religious or cultural significance he had located within the reservation. Most of the sites are along the Yakima River (TR 781-782) *outside* the reservation "closed area". The largest concentration of sites in the "closed area" in along the extreme eastern boundary (TR 778-779), *a very substantial distance from Petitioner's land.*

The result of the conflicting decisions in *Whiteside I and II* is to judicially require different land use regulations for similarly situated individuals and land based on the location of their land within the arbitrarily created "open" or "closed" areas of the reservation, *a classification unrelated to preservation of the Yakima Nation's political integrity, economic security, health and welfare.*

Non-Indian fee-owned land in the "open area" along the Yakima River where the largest number of religious and culturally significant sites are located is subject to

Washington State and Yakima County land use jurisdiction.

Brendale's land, located in the "closed area" far from any significant concentration or presence of religious or cultural sites and which has been logged over at least twice (the last time after a BIA "environmental assessment" found no religious or culturally significant sites in the area) is, however, subject to the Yakima Nation's exclusive land use jurisdiction.

Creation of the "closed area", classification and subjection of fee-owned land to land use jurisdiction based on its geographic location within the Yakima Indian Reservation do not bear any rational relationship to preservation of Yakima Nation's political integrity, economic security, health or welfare and violate Brendale's constitutional rights.

CONCLUSION

The Court of Appeals' decision in this case disregards Congress's express declaration land allotted and patented pursuant to the Dawes Act would be subject to state law and regulation as well as this Court's prior unambiguous holding in *Washington v. Yakima Indian Nation, supra,* of Washington State's complete civil jurisdiction of non-trust, fee simple land within the Yakima Reservation.

The Court of Appeals has misconstrued and misapplied this Court's decision in *Montana v. United States, supra,* in a manner which will disrupt a well-established county and state land use program although the county's exercise of land use jurisdiction does not result in any significant threat or have a direct effect on the Yakima Nation's political integrity, economic security, health or welfare.

Yakima Nation zoning regulation of fee-owned land within the Yakima Reservation based on whether or not the land is within the reservation "closed" or "open"

areas and Yakima Nation-BIA creation and perpetuation of the "closed" area have no rational relation to the protection of the Yakima Nation's limited sovereignty and violate due process, equal protection and just compensation provisions of the U.S. Constitution as well as the Indian Civil Rights Act.

Potential application of this case to other Indian reservations containing fee land and non-Indian landowners within the reservation requires this Court's reversal of the Court of Appeals' 9/21/87 "Opinion", the District Court's 9/11/85 "Judgement" and reaffirmation of *Montana v. United States, supra.*

Respectfully submitted,

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September 2, 1988

APPENDIX

APPENDIX

BIA.IA.0600 April 8, 1988

Patrick Andreotti, Esquire
Flower & Andreotti
Suite 1, Yakima Legal Center
303 East "D" Street
Yakima, Washington 98901

Re: Appeal of Portland Area Director's decision affirming the Yakima Agency Superintendent's denial of applications by Philip Brendale, Gary Gwinn and Larry Boyd for permits to use BIA roads

Dear Mr. Andreotti:

This letter is the decision of the Assistant Secretary—Indian Affairs on your appeal dated May 2, 1986, from the decision of the Portland Area Director of the Bureau of Indian Affairs affirming the decision of the BIA Yakima Agency Superintendent to deny the applications for road use permits by your clients, Philip Brendale, Gary Gwinn and Larry Boyd, based on a determination by the Yakima Tribal Zoning Administrator that your clients are in violation of the zoning regulations of the Yakima Indian Nation. For the reasons set out below, I have concluded that BIA officials are not authorized to deny access to the roads involved in this appeal because of alleged violations of tribal zoning laws.

On May 3, 1972, the Superintendent of the Yakima Agency issued a public notice closing most of the roads in a portion of the Yakima Indian Reservation to public travel. That notice stated the reasons for the closure:

> The closure is necessary to carry out the provisions of the Treaty which set aside the Reservation for the exclusive use and benefit of the Yakima Nation; and to protect the public safety, prevent and suppress

> fires, protect tribal fish and game and other resources, and protect unstable road beds, pursuant to 25 CFR 162.6 [now 25 CFR § 170.8 (1987)].

The notice stated that, except for tribal members, no one could use the roads without a permit issued by the Yakima Indian Nation and the BIA. It also announced that permits would be issued only to property owners in the closed area, persons employed by or doing business with the BIA or the Yakima Nation, "and to others who are engaged in activities of direct benefit to the Yakima Nation".

On August 19, 1974, the United States sued one of the appellants, Mr. Brendale, and his wife urging that they be enjoined from using the BIA roads because they refused to agree not to carry firearms into the closed area. Mr. Brendale, who is not a member of the Yakima Nation, owned land within the closed portion of the reservation.

On September 30, 1977, the court granted the injunction. It concluded that, given that tribal members had hunting rights on the reservation that are not shared by non-Indians, it was reasonable for the BIA to prevent non-Indians from carrying firearms in the closed area. *United States v. Brendale*, No. C-74-197 (U.S.D.C. E.D. Wash., September 30, 1977). The court cited *Superior Oil Co. v. United States*, 353 F.2d 34 (9th Cir. 1965), for the proposition that the BIA may restrict access by non-Indian landowners who have no easement across Indian lands. In that case, the BIA blocked access on the ground that the heavy equipment involved would cause damage to the unstable roadbed. *Id.* at 35-36.

In 1978, Mr. Brendale filed a new action alleging that he did have an easement over Indian lands. The court held that Mr. Brendale, his invitees, and his successors and assigns in interest had the right to use the BIA roads so long as that use is consistent with the reasonable use of the land and so long as there have not been general access restrictions placed on the roads under 25 CFR § 170.8(a). *Brendale vs. Olney*, No. C-78-145 (U.S.D.C. E.D. Wash., March 3, 1981).

Section 170.8(a) provides that BIA roads are, in most instances, open to the public:

> Free public use is required on roads eligible for construction and maintenance with Federal funds under this part. When required for public safety, fire prevention or suppression, or fish or game protection, or to prevent damage to unstable roadbed, the Commissioner may restrict the use of them or may close them to public use.

In 1983, Congress amended the term "Indian reservation roads" in the Federal-Aid Highways Act to include public roads only. 23 U.S.C. § 101(a). H. Rep. No. 97-555, 97th Cong., 2d Sess. 129 (1982).

In 1983, the Yakima Indian Nation filed another action in federal court seeking an injunction preventing Yakima County officials from authorizing Mr. Brendale to develop his property in a manner contrary to the Yakima Nation's zoning ordinance. The Yakima Nation prevailed in the federal district court and that decision was recently upheld on appeal. *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987) (*Whiteside*).

On December 19, 1984, you wrote the Yakima Agency Superintendent that Mr. Brendale had sold a portion of his property in the closed area to Gary Gwinn and leased another portion to Larry Boyd. You asked the Superintendent to issue road use permits to both Mr. Gwinn and Mr. Boyd. On December 24, 1984, the Superintendent requested the Yakima Nation Zoning Administrator to review your request "for compliance with Tribal Zoning". On January 23, 1985, the Zoning Administrator

wrote the Superintendent that subdivision of Mr. Brendale's property violated the tribal zoning ordinance.

The Superintendent denied your request by letter dated February 15, 1985. He asserted, based on the March 2, 1981, decision in *Brendale vs. Olney*, that the right to use BIA roads as access to the Brendale property was contingent on that property being used in a reasonable manner. He accepted the Zoning Administrator's determination as establishing that the property was being used in violation of tribal zoning laws and concluded that such use is unreasonable.

On April 12, 1985, you appealed the Superintendent's decision to the Portland Area Director, but asked for a stay pending the district court decision in the *Whiteside* case. The district court ruled for the Yakima Tribe in that case on September 11, 1985. *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735 (E.D. Wash. 1985). The Area Director affirmed the Superintendent's decision on March 3, 1986, and you appealed to this office on May 2, 1986. The district court decision in *Whiteside* was affirmed by the Ninth circuit on September 21, 1987.

The decision of both the Superintendent and the Area Director are based on a negative implication from the 1981 federal district court ruling in *Brendale v. Olney*, which provided that Mr. Brendale could use the BIA roads so long as his use was consistent "with the reasonable use of the land". Both the Superintendent and Area Director conclude that if Mr. Brendale is found to be using his land in an unreasonable manner, he no longer has the right to use the BIA roads.

The Court, however, did not address the fact that the BIA regulations mandate "free public use" of BIA roads. 25 CFR § 170.8(a). After the court ruled, Congress provided in 1983 that federally-funded Indian reservation roads must be public roads. 23 U.S.C. § 101(a). If a

road is a public road a traveller need not have an easement in order to use it. *See Grosz v. Andrus*, 556 F.2d 972 (9th Cir. 1977); *United States v. 10.0 Acres*, 533 F.2d 1092 (9th Cir. 1976); *United States v. City of Tacoma*, 330 F.2d 153 (9th Cir. 1964).

The only reasons for which the BIA may close a public road or restrict access to it are set out in 25 CFR § 170(a).

Significantly, the only federal court cases of which we are aware in which the court upheld a BIA closure of a public road involved closures for one of the purposes listed in § 170.8(a). In *Superior Oil Co. v. United States*, the public road was closed to prevent damage to an unstable roadbed. In *United States v. Brendale*, No. C-74-197 (U.S.D.C. E.D. Wash., September 30, 1977), persons who were not authorized to hunt game were prohibited from carrying firearms on BIA roads.

Because the enforcement of tribal zoning laws is not among the permissible reasons for the BIA to restrict access to a public road listed in § 170.8(a), the decisions of the Area Director and the Superintendent to prohibit your clients from using BIA roads to gain access to their property are reversed. This decision is final for the Department.

Sincerely,

JAMES S. BERGMANN
Acting Assistant Secretary
—Indian Affairs

Nos. 87-1622, 87-1697, 87-1711
CONSOLIDATED

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1988

PHILIP BRENDALE,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,

Respondents.

STANLEY WILKINSON,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

COUNTY OF YAKIMA, *et al.*,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT, YAKIMA INDIAN NATION

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QUESTIONS PRESENTED

1. Does Yakima County threaten the political integrity or economic security of the Yakima Indian Nation by imposing land use and zoning regulation upon the non-member owned fee lands of the Yakima Indian Reservation even though the majority of the reservation lands are trust lands regulated by Yakima Nation and the tribal regulations and county regulations conflict?

2. Does the Yakima Indian Nation still possess those aspects of sovereignty not withdrawn by treaty, statute, or by implication as a necessary result of its dependent status?

3. Has the sovereign power of the Yakima Nation to provide land use and zoning regulation to non-member owned fee land on the Yakima Indian Reservation been withdrawn by treaty, statute or by implication as a result of its dependent status?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE..... 1

A. Introduction 1

B. The Yakima Indian Reservation At Present 3

C. Tribal versus County Land Use Regulation 6

D. The Present Controversies..... 9

E. The Decisions Below 12

SUMMARY OF ARGUMENT 16

ARGUMENT 18

I. THE YAKIMA INDIAN NATION IS A TREATY SOVEREIGN WITH INHERENT POWER OF SELF-GOVERNMENT AND TERRITORIAL MANAGEMENT 18

A. The Yakima Nation's Inherent Sovereign Powers are Derived Explicitly From the *Treaty With the Yakimas,* 12 Stat. 951 ... 18

B. The Inherent Sovereign Powers of the Yakima Nation to be Self-Governing and to Provide Territorial Management has been Continuously Recognized by this Court 20

II. THE SOVEREIGN AUTHORITY OF THE YAKIMA NATION TO REGULATE LAND USE WITHIN THE YAKIMA INDIAN RESERVATION IS CRITICAL TO THE POLITICAL INTEGRITY AND ECONOMIC SECURITY OF THE YAKIMA NATION 24

TABLE OF CONTENTS–Continued

Page

A. The Yakima Nation Regulates Land Use and Zoning for All Trust Land within the Yakima Indian Reservation 24

B. The Yakima Nation Also Provides Land Use and Zoning Regulation for Tribal and Member Owned Fee Lands Outside the Incorporated Municipalities of the Reservation 25

C. County Zoning in the "Closed" Area is an Unmistakable Threat to the Political Integrity, Economic Security and Health and Welfare of the Yakima Nation..... 29

D. The Determination of Which Sovereign has the Ultimate Authority to Zone Non-Member Fee Lands in the Open Area Remains to be Resolved 31

III. THE YAKIMA NATION BELIEVES THE *MONTANA* CASE SETS FORTH AN UNPRECEDENTED DEPARTURE FROM BOTH PRE-*MONTANA* AND POST-*MONTANA* DECISIONS AND SHOULD NOT BE CONTROLLING TO THIS CASE..... 36

A. The *Mazurie-Wheeler-Colville* line of cases provide a better reasoned test of tribal sovereignty 36

B. The Treaty With the Yakimas Did Not Withdraw this Power..... 37

C. There is No Withdrawal or Divesture of the Yakima Nation's Inherent Power to Zone Non-Member Fee Lands by Implication 38

TABLE OF CONTENTS–Continued

Page

D. The Sovereign Power of the Yakima Nation to Zone Non-Member Fee Land has Not Been Divested or Abrogated by Statute 43

IV. THE EXERCISE OF TRIBAL CIVIL REGULATORY POWER OVER NON-MEMBERS IS NOT AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY 47

CONCLUSION 49

APPENDIX

Washington Adminstrative Code, Section 173-18-430..... 1a

TABLE OF AUTHORITIES

Page

CASES

Bryan v. Itasca County, 426 U.S. 373 (1976)..... 28, 46

California v. Cabazon Band of Mission Indians, 480 U.S. ___, 94 L. Ed.2d 244 (1987) ... 24, 28, 33, 42, 46

Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) *cert. denied*, 459 U.S. 967 (1982) 35

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981) 35, 36, 40, 42

Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982) *cert. denied*, 459 U.S. 977 (1982) 35

DeCoteau v. District Court, 420 U.S. 425 (1975) 45

Ex parte Crow Dog, 109 U.S. 556 (1883) 22

Garcia v. San Antonio Metro, 469 U.S. 528 (1985) 45

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. ___, 94 L. Ed.2d 10 (1987)..... 24, 33, 36, 42, 43

The Kansas Indians, 5 Wall 737 (1867).....22

Lone Wolf v. Hitchcock, 187 U.S. 299 (1903)..... 21, 43

Mattz v. Arnett, 412 U.S. 481 (1973) 27, 28

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 171 (1973).....41

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1981) 24, 36, 48

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) ..40, 41

Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976) 26, 27, 28, 45

Montana v. United States, 450 U.S. 544 (1981) .... *passim*

TABLE OF AUTHORITIES–Continued

Page

Morris v. Hitchcock, 194 U.S. 384 (1904) 48

National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 851 (1985) 24, 33, 42

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) 24, 25, 42

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 23, 33, 39, 43

Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977) 28

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 28

Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974) 19

Seymour v. Superintendent, 368 U.S. 351 (1962) 27

Talton v. Mayes, 163 U.S. 376 (1896) 47

United States v. Kagama, 118 U.S. 375 (1886) 22, 41

United States v. Mazurie, 419 U.S. 544 (1975) ..... *passim*

United States v. Wheeler, 435 U.S. 313 (1978) ..... *passim*

United States v. Winans, 198 U.S. 371 (1905) 19, 26, 37, 47

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 26, 30, 32

Washington v. Colville Tribes, 447 U.S. 134 (1980) . 40, 41

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) 24

Williams v. Lee, 358 U.S. 217, 221 (1958) 18, 22, 23, 26, 41, 43, 47

Worcester v. Georgia, 6 Pet. (31 U.S.) 515 (1832) 22, 23, 25, 39, 41, 43

TABLE OF AUTHORITIES–Continued

Page

FEDERAL CONSTITUTIONAL PROVISIONS

Fifth Amendment 47

Article I, Section 8 48

STATE CONSTITUTIONAL PROVISIONS

Article XXVI of the Washington State Constitution 2

STATUTES AND ADMINISTRATIVE PROVISIONS

Clean Air Act, 91 Stat. 1402, 42 U.S.C. Sec. 7401, 7474(c) 44

Clean Water Act, 100 Stat. 77, 33 U.S.C. Sec. 1377 44

25 Code of Federal Regulations Part 150-178 25

25 Code of Federal Regulations Part 271.32 25

Federal Insecticide, Fungicide and Rodenticide Act, 92 Stat. 834, 7 U.S.C. Sec. 136(u) 44

General Allotment (Dawes) Act of 1887 25 U.S.C. Sec. 331, et seq. 20, 26, 28, 44

Indian Financing Act of 1974, P.L. 93-262, 88 Stat. 77, 25 U.S.C. Sec. 1451 et seq. 44

Indian Land Consolidation Act of 1983, P.L. 96-459, 96 Stat. 2517, as amended by Act of October 30, 1984, P.L. 98-608, 98 stat. 3171, 25 U.S.C. Sec. 2201 et seq. 44

Indian Reorganization Act 48 Stat. 984, 25 U.S.C. Sec. 461, et seq. 3, 44

Indian Self-Determination and Education Assistance Act of 1974, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. Sec. 450 et seq. 44

TABLE OF AUTHORITIES–Continued

Page

Plats, Subdivisions, Dedications, RCW 58.17 34
Public Law 280 (67 Stat. 588) 17, 21, 28, 46
Safe Drinking Water Act, 100 Stat. 665, 42 U.S.C. Sec. 300j-11 44
Shoreline Management Act, RCW 90.58 34
State Environmental Policy Act RCW 43.21C 34
18 United States Code Sec. 1151 ..... 27, 44
25 United States Code Sec. 349 ..... 26, 28, 44
Washington Enabling Act, 25 Stat. 656 1

TREATIES

Treaty With The Yakimas, 12 Stat. 951 ..... 1, 2, 16, 18, 19, 20, 26, 37, 47

OTHER AUTHORITIES

Cohen's Handbook of Federal Indian Law 1982 Edition 21
Committee on Indian Affairs Report to the United States Senate 2, 3
Opinion of the Attorney General of Oregon, February 10, 1983, No. 8138 33
Opinions of the Solicitor, Dept. of Interior, 55 I.D. 14 (October 25, 1934) 43

STATEMENT OF THE CASE

A. ***Introduction***: The Confederated Tribes and Bands of the Yakima Indian Nation is an Indian nation which has maintained its sacred lands and traditions to the present time by virtue of the *Treaty With the Yakimas*, 12 Stat. 951. The governing body of the Yakima Nation continues to be recognized by the United States through the Secretary of the Interior – Bureau of Indian Affairs.

Through the *Treaty With the Yakimas*, the Yakima Nation, in 1855, ceded, relinquished and conveyed to the United States approximately 10,800,000 acres of land which had previously been dominated and occupied by the 14 tribes and bands making up the Yakima Nation. In the *Treaty With the Yakimas*, the Yakima Nation *reserved* from the large area of ceded land, for its *exclusive use and benefit*, approximately 1,300,000 acres of land which has come to be known as the Yakima Indian Reservation. [W. Ex. 1, p. 1] Governor Isaac Stevens was the primary treaty negotiator for the United States. In his efforts to convince the Yakima Nation to give up their lands (ceded area) and locate to a small portion of the lands they dominated (reservation area), Governor Stevens told the Yakimas:

> "It was found that when the white man and the red man lived together on the same ground, the white man got the advantages and the red man passed away." [W. Ex. 2, p. 19]

Consistent with Governor Stevens' statements, Article II of the *Treaty* [W. Ex. 1, p. 2] provides:

> "Nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon said reservation without permission of the tribe and the Superintendent and agent."

Less than 35 years after the United States and the Yakima Nation set forth their solemn agreement in the *Treaty With the Yakimas*, the United States Congress adopted an enabling act (25 Stat. 656, [W. Ex. 4]) in which the proposed states, including Washington:

> "do agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by an Indian or Indian tribes; and . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . .

Article XXVI of the Washington State Constitution of 1889 was adopted with language identical to that in the Enabling Act.

Notwithstanding the assurances of Governor Stevens, the unambiguous *Treaty* language, and the covenants with the state, the United States Congress unilaterally broke its agreements with various Indian tribes and opened fertile and valuable areas of various Indian reservations to the use and ownership by white men. While the Allotment Acts purported to "benefit" the Indian people and to assimilate them into a white man society, there is no doubt whatsoever that the primary motivation of Congress was to enable white people to gain ownership of the heart of most reservations. The Committee on Indian Affairs Report to the United States Senate in support of the legislation providing for the sale of surplus or unallotted lands of the Yakima Indian Reservation, [Act of December 21, 1904, 33 Stat. 595, reprinted in 3 Kappler 110 and 159 (1913)], demonstrates the greed of the non-Indians and the helplessness of the Yakima people to prevent the loss of their sacred lands. The report states:

> "*No agreement* has been made with these Indians, and *their consent has not been secured* for the opening of the reservation and the disposal of the unallotted lands. The failure to secure such consent or agreement, however, does not rest with the Government. Repeated attempts have been made to reach an agreement with these Indians and very liberal terms have been offered, but the Indians have declined to enter into such an agreement . . .

> This reservation is situated about 4 miles from North Yakima, a city with a population of about 7,000 people. It is located in the very heart of the irrigated district of Yakima County, and the state of Washington, and is *a very great hinderance* to the continued and complete development of that country. With so large a body of land as that held from settlement and cultivation, settlement and growth can not help but be retarded. We believe it to be very important that this reservation should be opened at once."[1]
> (Emphasis supplied.)

As soon as Congress opened the Yakima Indian Reservation to the non-Indian interests, a considerable amount of prime agricultural land passed from Indian to non-Indian ownership. The decay of the Yakima Indian Reservation continued for approximately 30 years, until the adoption of the Indian Reorganization Act. (25 U.S.C. Sec. 461 et seq.) Even though the Indian Reorganization Act halted the continued loss of most reservation lands, it did not specifically address the question of how the then present non-Indians and the then existing fee lands would fit into the revitalized concept that Indian people must govern themselves and their territory in order to maintain their economic, political and cultural identity. This continuing controversy, that is, the question of tribal regulation of non-Indians on various reservations, has been before in this Court in a variety of forms over the last century.

B. ***The Yakima Indian Reservation at Present***: The Yakima Indian Reservation still encompasses approximately 1.3 million acres. [For convenience, most reference support for factual matters will be to the Wilkinson petition (W.P.) and the appendix thereto.] Of the 1.3 million acres, *approximately 80 percent or 1.04 million acres is*

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[1] The full text of this report is printed at pages 1a-6a in the Brief for Mendocino County, et al, as Amici Curiae in support of Petitioners.

held in trust by the United States for the benefit of the Yakima Nation and/or its individual members. [W.P. p. 112a] The remaining 260,000 acres are held in fee by individual tribal members and by non-Indians. [W.P. p. 112a-113a]

In 1954, the Yakima Nation itself divided its reservation into two distinct areas for purposes of non-members' use and access. The Yakima Nation established a "closed" area of the reservation, permitting access only to Yakima Nation members and non-members receiving written permits. [W.P. p. 114a] The closed area consists of 807,000 acres, 740,000 of which are located in Yakima County. Of this 740,000 acres, 715,000 acres are held in trust by the United States and only 25,000 or 3.5 percent of the Yakima County closed area total, is held in fee. [W.P. p. 113a] A large majority of the fee land in the closed area is owned by a single timber company. [W.P. p. 128a and 129a]

The closed area of the reservation is predominately forest land; the remainder is non-irrigated range land. [W.P. p. 113a] Timber harvested in the closed area provides approximately 90 percent of the Yakima Nation's annual income. [W.P. p. 136a] The Yakima Nation has brought sophisticated game management and regulation to the closed area; as a result it abounds with game and wildlife. [W.P. p. 137a] The closed area also contains many places of cultural and religious significance to the membership of the Yakima Nation. [W.P. p. 136a] There are no permanent residents in the 740,000 acres of closed area in Yakima County.[2] Ingress and egress to the closed

[2] This was a finding of the District Court [W.P. p. 137a]. Petitioner Brendale has continued to make an effort to establish the existence of scattered structures in the "closed" area. The Yakima Nation disputes the validity of Petitioner Brendale's unsubstantiated remarks about such structures in the closed area.

area is monitored and controlled by four tribally-operated guard stations and by tribal police and tribal game officers patrolling the interior of the closed area. [W.P. p. 116a]

The remaining area of the Yakima Indian Reservation has, for the purposes of this case, been termed the "open" area. The open area consists of approximately 500,000 acres, 350,000 of which are located in Yakima County.[3] In Yakima County, approximately 175,000 acres, or 50 percent is trust land, and the remaining 175,000 acres, or 50 percent is fee land. [W.P. p. 40a and 83a] The total population of the open area is approximately 25,000, of whom 5,000 are tribal members. [W.P. p. 84a] The incorporated cities of Toppenish, Wapato and Harrah, with a combined population of approximately 10,000 are located on fee land in the open area. [W.P. p. 85a] White Swan is not an incorporated town nor does it lie within the closed area as stated by Petitioner Wilkinson. [See Map attached to Joint Appendix]

The open area of the Yakima Indian Reservation in Yakima County is predominantly agricultural. [W.P. p. 52a] Of the 143,000 irrigated acres in the open area, approximately 80,000 acres or 56 percent are held in trust status. [W. Tr. p. 422] The majority of the water to the irrigated lands in the open area is supplied by the federally constructed and maintained Wapato Indian Irrigation Project. [W. Tr. p. 416] Non-Indian water users on fee land

[3] The map attached to the Joint Appendix separates the open and closed areas in Yakima County. It does not identify the line between open and closed areas of the Reservation in Klickitat County and Lewis County.

are subject to regulation by the Wapato Project Manager, Portland Area office of the Bureau of Indian Affairs.

Contrary to petitioners' assertions, open area lands *do provide* considerable income to the Yakima Nation and its members. Approximately 67,466 acres of agricultural land in the open area is leased by the Yakima Nation and/or its members to non-Indians, resulting in the payment of more than $4,500,000 in annual land rentals.[4] This income is extremely important to the Yakima Nation economy. An additional 12,355 acres are farmed by tribal members, and also are very important to the Yakima Nation economy. The open area lands also are important to the Yakima Nation because of their religious and cultural significance. [W. Tr. p. 221-222] The importance of these open area lands to the Yakima Nation is clearly evidenced by the fact that the Yakima Nation has expended approximately 54 million dollars to regain ownership of deeded agricultural land in the open area of the reservation, land which had been lost to non-members during the Allotment era. [W. Tr. p. 119]

C. ***Tribal versus County Land Use Regulation***: These cases and the controversies which gave rise to their prosecution result from conflicting claims between Yakima County and the Yakima Nation as to which sovereign should provide land use and zoning regulation to that portion of the Yakima Indian Reservation located in Yakima County.

Comprehensive land use and zoning regulation is a relatively modern extension of a sovereign's police

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[4] Bureau of Indian Affairs' statistics on the Yakima Indian Reservation show an average annual cash rental of approximately $70.00 per acre for irrigated trust lands.

power. Prior to 1972, there were relatively few restrictions on land use within the Yakima Indian Reservation.[5] The zoning resolution of the Yakima Nation had only been in existence two years and was very basic compared to the comprehensive legislation now in place. In 1972, both the Yakima Nation and Yakima County adopted more comprehensive land use and zoning legislation. At the time, both ordinances were ultimately identical.

Yakima County's land use and zoning code regulates only fee lands outside the three incorporated cities resulting in the now familiar "checkerboard" regulatory scheme. This is in contrast with the Yakima Nation zoning code which provides uniform land use regulation for both trust and fee lands.[6] Yakima County has refined and updated its zoning codes applicable to fee lands on several occasions since 1972. The primary goal of the zoning codes of both the Yakima Nation and Yakima County in the open area remains the preservation of agricultural lands. [W. Tr. p. 35]

Petitioners argue to this Court that the Yakima Nation zoning code is defective because it has no subdivision provision. This simply is not accurate. Section 24 of the Yakima Nation Zoning Code clearly allows for subdivisions under the zoning term "planned development". [J.A. p. 65-76] A review of the planned development section of that zoning code establishes that

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[5] The temporary zoning resolution of 1946 and first zoning ordinance of 1965 by Yakima County did not provide comprehensive land use regulation as compared to more modern planning.

[6] As stated in Petitioners' briefs, the Yakima Nation has chosen to not assert zoning jurisdiction within the three incorporated cities in the open area.

subdivision schemes are permissible if the written requirements are met and the scheme is approved by tribal officials.

All petitioners boldly argue that Yakima County has provided "exclusive" land use regulation to the fee lands of the Yakima Indian Reservation for 35 years. Again, the evidence does not support this position. Keeping in mind that there exists approximately 175,000 acres of fee land and 20,000 non-Indians on the Yakima County portion of the reservation, the unchallenged statistics set forth by Yakima County and the other petitioners to support their position demonstrate the weakness of their argument. Yakima County states it has processed 148 short plats since 1965. [W. Tr. p. 457] This amounts to approximately eight short plats per year, not even one per month. Yakima County states it has processed 14 long plats since 1970. [W. Tr. p. 455] This amounts to only one long plat per year. Yakima County has issued 780 building permits since 1972. [W. Tr. p. 538] This breaks down to fewer than six per month. Insomuch as a building permit is required by modern governments on virtually every form of construction, this falls far short of "exclusive" County regulation on the reservation. In fact, in other litigation between Yakima County and the Yakima Nation, Yakima County has stipulated that during the past several years, only 6.4 percent of all matters worked on by the Yakima County Planning Department involve fee lands on the reservation.[7] It should also be noted that the Yakima Nation has processed 883 land use applications and 75

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[7] This is a fact to which Yakima County stipulated in *Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, et al.*, No. C-87-654-AAM, appeal pending Dkt. No. 88-3929 in Ninth Circuit.

variances since 1972, *including 317 applications by non-members*[8]. None of the items on petitioner County's "list of horribles" has occurred as a result of the Yakima Nation's land use regulation of their fee lands. Finally, petitioner Brendale's assertion that Yakima County has provided exclusive land use regulation to fee land in the closed area of the reservation is totally unfounded. The Yakima County Planning Director admitted at the time of trial that Yakima County had *never* attempted to exercise land use jurisdiction within the closed area of the reservation prior to the consideration of the Brendale proposal. [B. Tr. p. 475 and 504] The facts demonstrate that Yakima County has *not* provided exclusive land use regulation to fee land in the "open" area of the reservation and has previously provided *no* land use regulation to the fee lands in the "closed" area of the reservation.

D. ***The Present Controversies***: The issues now being presented to this Court stem from two separate and distinct land use disputes concerning non-Indian owned fee lands within the Yakima Indian Reservation. The initial controversy involves petitioner Brendale. Mr. Brendale is the owner of 160 acres of fee land located deep within the closed area of the reservation. [W.P. p. 127a-128a] He did not purchase this land; he inherited it from his mother and grandfather who were both Yakima Nation members. [W.P. p. 123a-124a] Mr. Brendale's land never passed by "alienation" as that term is used in the Allotment Acts.

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[8] For purpose of clarity in the later arguments regarding petitioners' "bright line" zoning proposition, the term "non-member" has been used throughout. This use is not intended to invite the Court into a discussion of tribal jurisdiction over non-member Indians versus "non-Indians" in a context other than civil matters. That is a separate and complex issue which need not be reached in resolution of this case.

Mr. Brendale's land is forested and access to it is by unimproved road. No structures exist on Mr. Brendale's land and its saleable value to date stems from the occasional harvesting of timber. [W.P. p. 129a-130a]

Mr. Brendale's quarrel with the Yakima Nation has been ongoing since he inherited the land in 1972. Mr. Brendale refused to obtain the required entry permit from the Yakima Nation and a lawsuit had to be commenced in 1974 (*United States v. Brendale*, E.D. Wash. Civil No. 74-179) to compel his compliance with permit requirements. In 1978, the ongoing friction erupted into a second lawsuit (*Brendale v. Olney*, E.D. Wash. C-78-145) concerning access to the Brendale property by his heirs and assigns. In 1981, Mr. Brendale sought to benefit from the Yakima Nation's ongoing program to regain ownership of fee lands by offering his property for sale to the tribe. [B. Ex. 206] These negotiations were fruitless as Mr. Brendale sought an exorbitant sale price for his land as "development property" while the Yakima Nation offered a purchase price based on its value as timber land. Mr. Brendale has attempted to coerce the Yakima Nation into paying his price by proceeding with subdivision plans through Yakima County with the idea that, if the courts would grant land use jurisdiction to the county, the Yakima Nation would be compelled to pay his inflated price to protect against non-Indian development in the closed area. [B. Ex. 206, 207, 208 and 209]

Specifically, in April, 1983, Mr. Brendale filed an application with Yakima County to subdivide 20 acres of his property into ten two-acre lots. The proposed use for the two-acre lots was sites for recreational cabins and travel trailers. [B. Ex. 122] In spite of the challenge by the Yakima Nation, Yakima County determined that it had jurisdiction over the Brendale request.

The proposed Brendale development is prohibited by the tribal zoning code. [J.A. 38-76] In the "closed" area (also termed "reservation restricted area" by the tribal zoning code), the land use activities are restricted by the tribal code to the following:

1) Harvesting wild crops
2) Grazing, timber production or open field crops
3) Hunting or fishing by Tribal members
4) Camping in temporary structures
5) Tribal camps for the education and recreation of tribal members
6) Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in furtherance of tribal resources
7) No building or other permanent structure or any appurtenance thereto other than those allowed in Sections 1 - 6 above shall be allowed
8) Any structure which is authorized in Sections 1 - 6 above shall be set back 200 feet from any waterway

Under the County zoning code, Brendale's proposed development is permitted. The County zones Brendale's lands as well as most fee land in the closed area as "forest watershed". [B. Tr. p. 490] Other uses permitted by the County zoning code in "forest watershed" include, the construction and operation of bars, restaurants, taverns, motels, cafes and gas stations. [B. Tr. p. 520 and 521] It is obvious that in the "closed" area, the zoning scheme of the Yakima Nation and of Yakima County are not compatible.

The second land use dispute may be less striking, but is no less compelling to the interests of the Yakima Nation government. It involves fee land located in the open area of the Yakima Indian Reservation. Petitioner Wilkinson owns in fee approximately 100 acres of vacant sagebrush land located approximately one mile south of the reservation's northern boundary, [W. Tr. p. 519] and three miles

south of the city of Yakima. The land is located on the north side of Ahtanum Ridge, an area (as petitioner Wilkinson points out) geographically separated from the vast majority of the open area of the reservation. [W.P. p. 47a]

The Yakima Nation zoned Mr. Wilkinson's land as "Agricultural". [W.P. p. 42a] Yakima County zoned Mr. Wilkinson's land as "General Rural". [W.P. p. 44a] In 1983, Mr. Wilkinson obtained preliminary approval from Yakima County to subdivide 40 acres into 20 residential lots ranging in size from 1.1 to 4.5 acres. [W.P. p. 48a] Lot sizes of this nature are allowed in the county's "General Rural" areas. Mr. Wilkinson did not seek tribal approval of the proposed development. [W.P. p. 49a] Under the tribal zoning code, minimum lot sizes are five acres in "Agricultural" areas. [W.P. p. 42a] Mr. Wilkinson would need a variance or would need to proceed under the planned development section of the tribal zoning code in order to gain tribal approval of the proposed development. The Yakima Nation opposed the Wilkinson proposal and the County's assertion of exclusive jurisdiction to provide land use and zoning regulation for the Wilkinson property and other fee lands in the open area. It is the position of the Yakima Nation that Mr. Wilkinson and all other owners of fee land[9] in the open area should obtain tribal approval in land use and zoning matters.

E. ***The Decisions Below***: The Brendale (Whiteside I) matter was the first to be decided by the District Court. The Yakima Nation commenced the action in the United States District Court for the Eastern District of Washington in September, 1983, seeking to establish that Yakima

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[9] As stated hereinabove, the position of the Yakima Indian Nation only relates to fee lands outside the limits of the three incorporated towns.

County was without lawful authority or jurisdiction to make exclusive land use and zoning determinations as to all fee land within the "closed" area of the reservation including the fee land owned by Brendale. [J.A. p. 13-23] Trial of the matter occurred in February, 1984, before the Honorable Justin L. Quackenbush. The court determined that *Montana v. U.S.*, 450 U.S. 544 (1981) was controlling and at the conclusion of the trial, Judge Quackenbush determined that the efforts by petitioner Brendale and Yakima County to bring a development to the "closed" area of the reservation was an unmistakable threat to the political integrity, economic security and health and welfare of the Yakima Nation. The District Court keyed on several factors in finding that the Yakima Nation and not Yakima County had the authority to provide zoning and land use regulation as to the non-Indian fee lands in the "closed" area. [W.P. p. 127a-139a] They included:

1) The fact that the Yakima Nation has unquestioned authority to regulate land use and zoning for 96.5 percent (trust lands) of the closed area lands

2) The violent conflict between the uses permitted by the tribal and county zoning codes

3) The fact that 90 percent of all tribal income is generated from sales of timber harvested in the "closed" area

4) The demonstrated cultural and religious significance of the closed area of the reservation

5) The undeniable interruption to the wildlife and natural habitat of the presently uninhabited "closed" area, which could result from county zoning

6) The complete lack of any county interest in the closed area

In fact, Judge Quackenbush found as proven, 35 important facts which led to the conclusion that under *Montana*, the Yakima Nation, and not Yakima County, must provide land use and zoning regulation to the relatively small

area of fee lands in the "closed" area including that owned by petitioner Brendale.

After the Brendale (Whiteside I) matter was tried and an opinion issued, the Wilkinson (Whiteside II) matter went to trial in June, 1984, also before the Honorable Justin L. Quackenbush. As before, the court determined that *Montana v. U.S., supra,* was controlling. At the conclusion of the trial, Judge Quackenbush found the two cases to be different. Judge Quackenbush focused on the non-member and county interests which were present in the open area, but lacking in the closed area. [W.P. p. 51a-55a] The court compared the fact that in the closed area there are no non-member residents, but in the open area there are approximately 20,000 non-member residents. [W.P. p. 82a] The court compared the fact that in the closed area, fee lands constitute only 3.5 percent of the total lands, but in the open area, fee lands constitute approximately 50 percent of the total lands.[10] Overall, the reservation is approximately 80 percent trust land. [W.P. p. 82a-83a] The court compared the fact that in the closed area, Yakima County provided no governmental services, but in the open area, Yakima County provided a greater degree of governmental services. [W.P. p. 86a-87a] Finally, the court compared the fact that the County had exercised zoning jurisdiction on the fee lands of the open area for 35 years, and never in the closed area. [W.P. p. 85a-86a]

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[10] The fee land figures include the fee lands located within the three incorporated cities which are not at issue in these cases.

Judge Quackenbush then determined, as a threshold matter of law, that the Yakima Nation was without inherent sovereignty to provide land use and zoning regulation to the non-member owned fee lands of the open area. [W.P. 67a] Judge Quackenbush failed to balance the interests of the Yakima Nation against those of Yakima County. The Court failed to consider whether on-reservation zoning and land use regulation has any effect or bearing on the off-reservation interests of the County.

The Brendale (Whiteside I) and Wilkinson (Whiteside II) decisions both were appealed to the Ninth Circuit Court of Appeals.[11] The Ninth Circuit reviewed both cases and examined the issues under the tests of *Montana.* The Ninth Circuit had no trouble affirming the Brendale (Whiteside I) case. The court simply balanced the interests of the Yakima Nation against those of Yakima County and concluded that the County was precluded from zoning fee land within the closed area because the County's interest in imposing its regulation was clearly outweighed by the significant interests of the Yakima Nation. [W.P. p. 25a-29a] The Ninth Circuit then considered the question of which sovereign should regulate the zoning of fee land in the open area. Tne Court ruled that the District Court's threshold determination that the Yakima Nation had been stripped of its inherent authority to zone fee lands in the open area was an error of law. [W.P. p. 29a-31a] The Ninth Circuit correctly observed that the

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[11] *Yakima County chose not to appeal the Brendale decision regarding the closed area.* The County apparently was satisfied with Judge Quackenbush's decision giving the Yakima Nation's exclusive jurisdiction to provide zoning and land use regulation to the non-member fee land in the closed area. The County should not now be heard to argue that its zoning authority can be imposed in this area under a "bright line" test. (Brief of Yakima County at 33-36)

Yakima Nation derives its governmental authority not only implicitly from its status and a dependent sovereign, but explicitly from the *Treaty With the Yakimas*. [W.P. p. 17a] The Ninth Circuit applied this to the present status of the Yakima Indian Reservation stating:

> "Yakima Nation has exclusive authority to zone tribal trust land, which constitutes nearly all of the closed area and over half of the open area. Although the fee land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checker board pattern. If we were to deny Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning so fundamental to a zoning scheme. This we are unwilling to do." [W.P. p. 24a]

Because of this error of law, the Ninth Circuit reversed the District Court and remanded the matter with directions to balance of interests of Yakima County and the Yakima Nation and to weigh their competing interests keying on how county on-reservation zoning impacts or is connected with off-reservation interests. Because this Court has interceded by accepting certiorari, the question of which sovereign should provide ultimate land use and zoning authority to fee lands in the open area has not yet been resolved by either the District Court or the Ninth Circuit.

SUMMARY OF ARGUMENT

The Yakima Nation possesses all aspects of governmental sovereignty not withdrawn by treaty, statute, or by implication as a necessary result of its dependent status. Among these retained aspects of governmental sovereignty is the power to zone the reservation lands, as land use control is a fundamental aspect of local government.

The Yakima Nation argues that under *Montana v. United States*, 450 U.S. 544 (1981), the Yakima Nation has demonstrated that the claim of zoning authority by Yakima County as to non-member owned fee land within the Yakima Indian Reservation is a clear threat to the political integrity, economic security and health and welfare of the Yakima Nation. The County zoning code conflicts with the Tribal zoning code and interferes with the Tribe's authority over the trust lands which constitute the vast majority of the reservation.

The Yakima Nation then argues that *Montana v. United States, supra*, should not dictate the analysis of whether the Yakima Nation possesses the sovereign power to provide land use and zoning regulation to non-member owned fee land. The Yakima Nation contends that both previous and subsequent cases from this Court provide a consistently applied test, recognizing that Indian tribes have retained all aspects of sovereignty not withdrawn, as opposed to the *Montana* premise which provides that tribal power beyond what is necessary to protect tribal self-government is inconsistent with the dependent status of the tribes and cannot survive without express congressional delegation.

In employing the traditional sovereignty analysis, the Yakima Nation establishes that the power to zone non-member fee land has not been withdrawn by treaty or by statute, including the Allotment Acts and Pub. L. 280, and is not inconsistent with its dependent status.

Further, the Yakima Nation demonstrates that the zoning of non-member owned fee land is not an unconstitutional delegation of authority to the Yakima Nation by Congress. Restraints preventing the Yakima Nation from administering its zoning code in an unfair and discriminatory manner are obvious. Congress has the

plenary power to take this sovereign power away from the Yakima Nation if it so desires.

ARGUMENT

I. THE YAKIMA INDIAN NATION IS A TREATY SOVEREIGN WITH INHERENT POWER OF SELF-GOVERNMENT AND TERRITORIAL MANAGEMENT.

A. The Yakima Nation's Inherent Sovereign Powers are Derived Explicitly From the *Treaty With the Yakimas*, 12 Stat. 951.

On June 9, 1855, Governor Isaac Stevens, on behalf of the United States, entered into the *Treaty With the Yakimas*, 12 Stat. 951. This *Treaty* was ratified by the Senate on March 8, 1859, and signed by President Buchanan on April 18, 1859. In the *Treaty*, the Yakima Nation ceded, relinquished and *conveyed* to the United States over ten million acres of land owned by the Yakima Tribes. From this ceded area, the Yakima Nation *reserved* for its "exclusive use and benefit" a relatively small area of land which has become known as the Yakima Indian Reservation. Article II of the *Treaty* provides:

> "nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without the permission of the tribe and the superintendent and agent."

This Court has interpreted and explained the legal effect of similar treaty language. In *Williams v. Lee*, 358 U.S. 217, 221 (1958), the following guidance was given:

> "In return for [Indian] promises to keep peace, this treaty 'set apart' for their permanent home a portion of what has been their native country, and provided that no one – except United States personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively

> within the jurisdiction of whatever tribal government exists."

The *Treaty With the Yakimas* has been specifically construed by this Court. In *United States v. Winans*, 198 U.S. 371 (1905), this Court provided:

> "And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the rights, without regard to technical rules.' *Choctaw Nation v. United States*, 119 U.S. 1; *Jones v. Meehan*, 175 U.S. 1"

Winans at 380.

> "In other words, the Treaty was not a grant of rights to the Indians, but a *grant of rights from them*, – a reservation of those not granted."
> (Emphasis supplied.)

Winans at 381. See also *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).

The concept that the Yakima Nation would govern themselves and their lands from which the white man would be excluded, was explained in explicit language at the Walla Walla Treaty grounds in 1855:

> " The Great Fathers name at that time was Andrew Jackson: he said I will take the red man across the great river into a fine country where I can take care of them; they have been there twenty years; *they have their government, they have their schools, they have their own laws*; their Cheif (sic) John Ross knows as much as my brother or myself and a great deal more; . . .
>
> Robert Johnson lives near John Ross *they both told me that what had been done for John Ross should be done for you, and more*, as I will tell you. . . .
>
> *I repeat again no white man could go there unless the red man consented to it.*
>
> *North of that tract of land the whites are going in but they cannot enter it; . . . that tract of land is the Indians*

home; his home and the home of his children." [W. Ex. 2 p. 19-20] (Emphasis supplied).

Kamiakin, the head chief of the Yakimas at the treaty responded:

> "I have something different to say than the others have said. It is young men who have spoken; I have been afraid of the white man, their doings are different from ours. Your cheifs (sic) are good, perhaps you have spoken straight, that your children will do what is right, *let them do as they have promised*. This is all I have to say." [W. Ex. 2 p. 49]

Obviously these "unlettered people" must have understood that they retained their government, that the reservation was theirs alone, and the white man could not enter without their consent.

The petitioners' contention that the Yakima Nation did not maintain and reserve in the *Treaty*, inherent power of self-government and territorial (reservation) management fails in light of this Court's previous interpretation thereof; the treaty itself, and the minutes of the treaty council. The Ninth Circuit was correct when it determined that the Yakima Nation derives authority "explicitly" from the *Treaty With the Yakimas*.[12]

B. The Inherent Sovereign Power of the Yakima Nation to be Self-Governing and to Provide Territorial Management has been Continuously Recognized by this Court.

History reports a vacillating federal policy toward Indian tribes and their reservation lands. A very brief review of this history is important to put the issues before this Court in perspective. From the time of the *Treaty* in 1855 to the time of the General Allotment (Dawes) Act of 1887, the federal policy was of treaty

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[12] The Ninth Circuit held that retention of Yakima Nation's inherent sovereignty was explicitly *recognized* and *reserved* by the treaty.

making and establishment of the federal control of Indian affairs. In 1887, a federal policy of allotment and assimilation was introduced. This policy continued to approximately 1930 when federal policy shifted to Indian reorganization and the strengthening of Indian governments. This policy lasted until World War II, a time when most young Indian men were at war and there was a high rate of employment of Indian people in war support programs. Federal policy moved back to a policy of termination and a partial abandonment of federal trust responsibilities to states. Several reservations were terminated and in 1953, Public Law 280 (67 Stat. 588) was adopted. The dismal failures of termination policies became evident and in 1961, the direction of federal policy returned to a strengthened concept of Indian self-determination and tribal economic development. This federal policy has continued uninterrupted to the present. (See Cohen's *Handbook of Federal Indian Law*, 1982 Edition, p. 47 to 204 for a detailed analysis of the history of federal Indian policy.)

In conjunction with the revolving federal policies toward Indians, all tribes, including the Yakima Nation must contend with the principle of *Lone Wolf v. Hitchcock*, 187 U.S. 299 (1903). In this case, this Court stated the concept that regardless of the many treaty contracts, Congress has plenary power over tribal relations and tribal lands, and that treaty language will fail against specific legislation which Congress has intended will abrogate Indian treaty rights. This combination of the principle of plenary power and vacillating congressional policy have left this Court and lower courts with a difficult task of sorting out the continuing viability of inconsistent congressional enactments and whether the repudiated legislation remains plenary to Indian treaty rights.

In spite of the backdrop of inconsistent federal policy, this Court has not wavered[13] from the concept that Indian tribes have inherent power of self-government and territorial management unless those powers have been abrogated by *specific* congressional legislation or are inconsistent with their dependent states. This line of authority begins with *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515 (1832). In *Worcester* at 560-561, Chief Justice Marshall explained:

> "The senate docketing of the law of nations is that a weaker power does not surrender its independence–its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, a ceasing to be a state."

The *Worcester* concepts were reaffirmed and followed by this Court in an unbroken line of subsequent cases including *The Kansas Indians*, 5 Wall 737 (1867); *Ex parte Crow Dog*, 109 U.S. 556 (1883); and *United States v. Kagama*, 118 U.S. 375 (1886).

The modern analysis of issues of self-government and territorial management begins with *Williams v. Lee, supra*. In *Williams*, this Court noted that no *specific* federal enactment had abrogated the powers of the Navajo Tribe to be self-governing, nor had Congress provided the state of Arizona with such jurisdiction over reservation Indians. This Court then set forth the landmark test against which issues of state and tribal jurisdictional conflicts are measured:

> "Essentially, absent governing Acts of Congress, the question has always been whether the state action

[13] But cf. *Montana v. United States*, 450 U.S. 544 (1981)

> infringed on the right of reservation Indians to make their own laws and be ruled by them."

Williams v. Lee, at 220.

The reborn recognition of the principles of *Worcester* has remained constant in cases subsequent to *Williams v. Lee, supra*. More importantly, subsequent to *Williams*, Congress has not enacted any legislation having a purpose of increasing state jurisdiction, thereby weakening tribal government. To the contrary, Congress has adopted numerous pieces of legislation which recognize the strengthen of tribal government and sovereignty.[14]

The cumulative impact of *Williams v. Lee, supra*, and modern congressional legislation aimed at strengthening tribal government was recognized in this Court in *United States v. Mazurie*, 419 U.S. 544 (1975), which involved the question of tribal regulation of on-reservation liquor sales by non-Indians on fee land. This Court stated:

> "Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over *both their members and their territory*, *Worcester v. Georgia*, 6 Pet. 515, 557, 8 L. Ed. 483 (1832); they are 'a separate people' possessing 'the power of regulating their internal social relations' . . . "
> (Emphasis supplied.)

United States v. Mazurie, at 557. Based in large part on this pronounced concept, this Court sustained the lawful authority of the Wind River Tribe to regulate liquor sales by non-Indians.

The *Mazurie* case was followed by the landmark cases of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978). In

[14] See a listing of such legislation infra at page 44.

Wheeler, this Court set forth the definitive test for determining the extent of inherent tribal sovereignty providing:

> "The sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. *But until Congress acts, the tribes retain their existing sovereign powers.* In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a result of their dependant status."
> (Emphasis supplied.)

U.S. v. Wheeler, at 323.

The sovereignty pronouncements set forth in *Mazurie* and *Wheeler* have been used and repeated by this Court in many recent cases including, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1981); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 851 (1985); *California v. Cabazon Band of Mission Indians*, 480 U.S. ___, 94 L. Ed.2d 244 (1987); and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. ___, 94 L. Ed.2d 10 (1987). The common denominator of each of these cases, and this Court's resolution of the divergent issues which were reviewed, is that, in spite of the reputed allotment and termination legislation, Indian tribes have retained inherent sovereign powers over both their members and their territory, unless there exists *specific* legislation to the contrary or divestiture by implication.

II. THE SOVEREIGN AUTHORITY OF THE YAKIMA NATION TO REGULATE LAND USE WITHIN THE YAKIMA INDIAN RESERVATION IS CRITICAL TO THE POLITICAL INTEGRITY AND ECONOMIC SECURITY OF THE YAKIMA NATION.

A. The Yakima Nation Regulates Land Use and Zoning for All Trust Land Within the Yakima Indian Reservation.

It is a given that the Yakima Nation has exclusive authority to provide zoning and land use regulation to the trust lands of the Yakima Indian Reservation. During both the Brendale (Whiteside I) and Wilkinson (Whiteside II) trials at the district court level, all parties, including Yakima County, Wilkinson and Brendale, concede that the Yakima Nation has exclusive regulatory authority as to the trust lands in both the closed and open areas of the reservation. In fact, the Yakima County Planning Director testified that Yakima County Zoning Ordinance and the zoning maps exclude trust lands from any county zoning designations. [W. Tr. p. 527] This inherent tribal authority was recognized by the Ninth Circuit in its opinion below. The petitioners' concession to the regulatory authority of the Yakima Nation over the trust lands is consistent with *Worcester*, *Mazurie*, *Wheeler*, and the *New Mexico v. Mescalero Apache Tribe*, *supra*. See also 25 CFR Part 150 - 178 and Part 271.32 which sets forth federal guidelines for the regulation of trust lands.

B. The Yakima Nation Also Provides Land Use and Zoning Regulation for Tribal and Member Owned Fee Lands Outside the Incorporated Municipalities of the Reservation.

The Yakima Nation and many enrolled members of the Yakima Nation own fee lands outside the three incorporated cities located within both the closed and open areas of the Yakima Indian Reservation.[15] In addition to the petitioners' primary argument that the Yakima Nation is without authority to provide land use and zoning

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[15] The following legal argument assumes that the reader understands that the Yakima Nation has chosen not to provide zoning and land use regulation within the three incorporated cities. References to fee lands in the open area of the Reservation exclude the fee lands in said incorporated towns.

regulation to *non-member owned* fee land, there appears to be an issue concerning the regulatory authority of the Yakima Nation as to *tribal and member owned* fee land. Petitioner Yakima County urges this Court to establish a "bright line" test which would provide for state and county zoning jurisdiction over fee lands and tribal jurisdiction over trust lands. The Yakima Nation believes a discussion of this issue may be important to the resolution of the primary issue.

The suggestion of Yakima County is too simplistic and ignores important federal and tribal concerns. The *Treaty With the Yakimas* guaranteed to the Yakima Nation the exclusive right to make its own laws and govern its own membership and territory. See *Williams v. Lee, supra,* and *United States v. Winans, supra.* Zoning and land use regulation is a fundamental exercise of local government as it protects the health and welfare of its citizens. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). The Yakima Nation has not been divested of this inherent authority when a member resides on fee land within the Yakima Indian Reservation. In *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463 (1976), this Court rejected the argument that state jurisdiction existed over tribal members residing on land which had been titled in fee under the General Allotment Act. The state of Montana had argued that it had general civil jurisdiction over tribal members on fee lands because of the language of Section 6 of the Allotment Act (25 U.S.C. 349) which reads in part as follows:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . "

This Court found Montana's argument to be "untenable", and that continued the efficacy of the General Allotment Act would substantially diminish the reservation's size. This Court concluded "such an impractical pattern of checkerboard jurisdiction" was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. *Moe v. Salish & Kootenai Tribes,* at 478.

In *Moe,* this Court relied heavily upon the cases of *Seymour v. Superintendent,* 368 U.S. 351 (1962) and *Mattz v. Arnett,* 412 U.S. 481 (1973). In both of these cases, this Court considered the question of whether the General Allotment Act provided state jurisdiction over tribal members for activities conducted on fee lands lying within a federally recognized reservation. In *Seymour,* a member of the Colville Indian Tribe was charged in state court for a burglary committed on deeded land within the Colville Indian Reservation. This Court ruled that the state courts had no jurisdiction and that the offense was within the exclusive jurisdiction of the United States. This Court determined that the offense was committed in Indian country defined by 18 U.S.C. Sec. 1151 which reads in part as follows:

> "Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent,* and, including rights-of-way running through the reservation . . . "
> (Emphasis supplied.)

The *Seymour* analysis of 18 U.S.C. Sec. 1151 was repeated in *Mattz v. Arnett, supra.* This Court, in reversing the decisions of the California state courts, ruled that all lands, including the fee lands of the Klamath River Reservation were to be considered "Indian country" as defined by 18 U.S.C. Sec. 1151. This Court rejected the contention

that Section 6 of the Allotment Act (25 U.S.C. 349) continued as a grant of state jurisdiction over the allotted fee lands, noting that "the policy of allotment and sale of surplus land was *repudiated* in 1934 by the Indian Reorganization Act. *Mattz v. Arnett*, at 496 n.18.

Petitioners also cannot rely on Public Law 280 (67 Stat. 588) as authority for state and county zoning of Indian owned fee lands. This Court has specifically stated that Public Law 280 does not intrude upon inherent tribal regulatory authority, *California v. Cabazon Band of Mission Indians, supra.*

This Court has rejected the argument that the Allotment Act provides state jurisdiction over reservation Indians on reservation fee lands, Congress having "eschewed" any such "checkerboard" approach to such jurisdiction questions, *Moe* at 479.[16] Furthermore, as to the tribally owned fee lands of the reservation, Yakima County is without power to enforce its zoning ordinance.[17] Federal policy as construed by this Court has clearly established that only the Yakima Nation has the exclusive authority to bring zoning and land use regulation to tribal and member owned fee land in both the closed and open area of the Yakima Indian Reservation. Accordingly, the County's "bright line" test cannot meet the standards required by this Court.

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[16] See also footnote 14 in *Bryan v. Itasca County*, 426 U.S. 373, at 388, discussing this Court's recognition of the concept that the Court need not follow legislation not repealed, but clearly repudiated by later congressional action.

[17] The Yakima Nation enjoys sovereign immunity and believes that Yakima County could not compel the Tribe to comply with the County codes. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977)

C. County Zoning in the "Closed" Area is an Unmistakable Threat to the Political Integrity, Economic Security and Health and Welfare of the Yakima Nation.

The "closed" area consists of 807,000 acres, 740,000 acres of which are located in Yakima County. The remaining 67,000 acres are located in Klickitat and Lewis Counties. In the closed area of Yakima County, 715,000 of the 740,000 acres are held in trust by the United States for the Yakima Nation or individual tribal members. The majority of the fee land is owned by a single timber company. The closed area is predominantly forest land. The remainder is non-irrigated range land. The Yakima Nation derives approximately 90 percent of its annual income from timber harvested in the closed area. This income is used to fund tribal governmental operations. The closed area also contains many places of cultural and religious significance. The closed area supports wildlife and plant life which are a major source of food for tribal members. There are no permanent residents in the closed area of Yakima County. The Yakima Nation provides all law enforcement and game enforcement in the closed area.

In comparison, Yakima County provides no services in the closed area. The County has no roads in the closed area. The county provides no law enforcement or game management in the closed area. Petitioner Brendale's plat request which precipitated this case was the first effort by Yakima County to assume land use jurisdiction in the closed area. Petitioners Brendale and Yakima County ask this Court to rule that Yakima County should provide zoning and land use jurisdiction to the relatively minuscule area of fee land checkerboarded in the closed area. Uses which would be permitted in the closed area by the county are radically incompatible with the uses permitted by the tribal zoning code.

Montana sets forth the test against which the District Court and the Ninth Circuit measured these facts. In *Montana*, this Court provided:

> "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Montana at 566.

Under this test, the Yakima Nation has established that the effort of Yakima County to bring zoning and land use jurisdiction to non-member owned fee land of the closed area is an overwhelming threat to the political integrity, economic security, and health and welfare of the Yakima Nation. The County Prosecuting Attorney summed up the position of the Yakima Nation best when he was discussing the closed area in argument to the District Court in Whiteside II. Mr. Sullivan stated:

> "Okay. But I agree this is a totally different area with a different interest. I think your Honor's question in the first case [Whiteside I] to me and Commissioner Tollefson were totally appropriate – what do you do out there? Nothing in the Closed Area. *We couldn't present any testimony about the services we provide; they don't exist. The real interest out there [in the Closed Area] does belong to the Yakima Indian Nation; we agree.*" [W. Tr. p. 372]
> (Emphasis supplied.)

Zoning regulation is a fundamental exercise of local government because it is designed to protect and promote the health and welfare of its citizens. *Village of Euclid v. Ambler Realty Co., supra.* This Court should not deprive the Yakima Indian Nation of its land use and zoning jurisdiction over non-member fee land in the closed area. To do such would open land use and zoning decisions in the closed area to four jurisdictions, Yakima County, Klickitat County, Lewis County, and the Yakima Nation.

Such chaos would undoubtedly destroy the Yakima Nation's ability to control the land use of its forest lands and to effectively manage the many natural resources of the closed area. This would undoubtedly be a detriment to the health and welfare of tribal members. Under the tests of *Mazurie/Wheeler*, and under the *Montana* test, the Yakima Nation must prevail in the closed area.

D. The Determination of Which Sovereign has Ultimate Authority to Zone Non-Member Fee Lands in the Open Area Remains to be Resolved.

The open area of the Yakima Indian Reservation presents circumstances for a *Montana* analysis different than those found in the closed area. Yakima County and the Yakima Nation both have asserted jurisdictional authority over non-member owned fee land for many years. As is the circumstance in the closed area, the Yakima Nation has unquestioned authority to regulate the land use and zoning for the trust lands in the open area. Considering that the incorporated cities and towns are not part of the dispute, the trust lands constitute more than 50 percent of the open area of the reservation. The fee lands are scattered among the trust lands in true checkerboard fashion. The map in the joint appendix demonstrates that no portion of the open area is predominately fee lands. It is not possible to foreclose the Yakima Nation's voice in the land use and zoning of the non-member fee lands without adversely affecting its abilities to regulate the trust lands.

As stated previously, the Yakima Nation, and particularly its members, derive a significant income from the lease of the irrigated trust lands. The open area also contains religious and cultural sites and many Indian cemeteries. [W. Tr. p. 213-220] Yakima County identified several *on-reservation* interests in an effort to substantiate its claim of zoning authority over non-member owned fee

land. These interests included the non-Indian population, county roads, law enforcement activities, and public schools. Yakima County did not identify a single off-reservation interest to support its claim of authority to zone the non-member owned fee lands of the reservation.

The District Court made a threshold determination of law that the Yakima Nation was without authority to exercise zoning jurisdiction over the non-member owned fee land. The Ninth Circuit disagreed with this conclusion of law. This Court should affirm the holding of the Ninth Circuit on this issue. The Ninth Circuit began with the basic premise that the power to zone is fundamental to a local government in order to protect the health and welfare of its citizens, citing *Village of Euclid v. Amber Realty Co., supra*. The Ninth Circuit was also very concerned about the effectiveness of two jurisdictions providing "checkerboard" zoning authority. Because zoning and land use are such a basic function of local government, the Ninth Circuit ruled the Yakima Nation has inherent authority to zone non-Indian fee land throughout the reservation, and remanded the case back to the District Court to balance the interests of the Yakima Nation against those of Yakima County in the open area to determine which sovereign should provide ultimate authority for the zoning of non-member fee land using the *Montana* test.

In argument to this Court, each of the petitioners and most of their amici have seized upon the unprecedented divesture statement in *Montana*, wherein this Court provided, "exercise of tribal government beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana* at 564. As argued

hereinbelow, this concept is difficult to reconcile with both previous and subsequent decisions of this Court. However, *Montana* then gave back most of what it took away from inherent tribal sovereignty by providing the above-quoted second exception, stating that tribes may retain inherent power of civil authority over non-members on fee lands when the political integrity, economic security, or health or welfare of the tribe is threatened.

Petitioners argue that this exception must be viewed narrowly. The Yakima Nation argues that if the divesture statement survives this Court's analysis in this case, then this second exception must be read broadly in order to mesh with the subsequent opinions of this Court in *Cabazon, National Farmers,* and *Iowa Mutual*. To read this second exception broadly will not necessarily produce the catastrophic results predicted by Yakima County.[18] It does not grant "virtually unlimited police power jurisdiction over the conduct of non-members on fee lands." *Oliphant,* is law and, therefore, any exercise of police

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[18] Clearly the Attorney General for the state of Oregon did not contemplate any such problems in giving his opinion, post-*Montana*, that the Umatilla tribe of Oregon had exclusive zoning authority over fee lands within its reservation. *Opinion of the Attorney General of Oregon, February 10, 1983, No. 8138.* The Umatilla Reservation, at the time of this opinion, was less than 40 percent trust land, in contrast to Yakima Reservation which is nearly 80 percent trust. The Umatilla treaty (12 Stat. 954) was concluded at the Walla Walla treaty grounds on *June 9, 1855*, the same day, same place and with the same negotiators who dealt with the Yakima treaty. Further, in response to the constitutional rights issue discussed by petitioner Brendale, the Oregon Attorney General concluded:

Question Two:

> "Will the constitutional rights of non-Indians who either reside in the area or own property in the area be represented in developing such a land use code?"

Answer: No.

power by the tribe over non-members must be reasonably enforceable through civil proceedings. Yakima County also assumes that the Ninth Circuit opinion invalidates state legislation on non-member fee land including Plats, Subdivisions, Dedications, RCW 58.17; Shoreline Management Act, RCW 90.58; and the State Environmental Policy Act, RCW 43.21C. Again, this argument distorts the Ninth Circuit opinion. The Ninth Circuit properly stated that a state's regulatory interest will be particularly substantial if the state can point to off-reservation effects (as could be done for these legislative enactments). Whether or not these statewide enactments are effective as to non-member owned fee land on the reservation is not before this Court.[19]

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[19] While the issue of other statutes' applicability is not before the court, petitioner's have raised the specter of invalidation of numerous acts which they claim presently apply at least to fee patent reservation lands. They cite the Shorelines Management Act, RCW 90.58 as one of these examples. It is interesting to note, however, that the Washington State Department of Ecology, the agency charged with administration of that act, has specifically excluded water and lands "within the Yakima Indian Reservation" (Ahtanum Creek, which forms the north boundary of the reservation and which flows through numerous fee patent lands on the reservation), and "all federal lands and Yakima Indian Reservation" (Yakima River which forms the east and a portion of the south boundary and which also flows through fee patent lands on the reservation).

Further, those state regulations are silent on Toppenish and Satus Creeks (totally on-reservation streams, which flow through and border many fee patent lands), both of which are otherwise eligible for inclusion under RCW 90.58. At least, for purposes of the Shorelines Management Act, it is clear that the state administrative agency with jurisdiction has recognized that the act does not have the applicability cited by petitioners.

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This case is factually dissimilar from the setting in *Montana*. The Yakima Nation has not accommodated itself to near exclusive regulation of land use and zoning of non-member fee land. However, the similarity between the county and tribal zoning codes in the open area did suppress for a time the inevitable conflict between the two sovereignties. This case is more akin to the circumstances in *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982) *cert. denied*, 459 U.S. 977 (1982), *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981) and *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982) *cert. denied*, 459 U.S. 967 (1982). In each of these post-*Montana* cases, this Court refused to review lower court decisions which had balanced tribal interests favorably against state interests and thereby provided for tribal civil regulatory authority over non-members on fee lands.[20] If the *Montana* principal and two exceptions are to be the cornerstone of issues of inherent authority of tribes over non-members, this Court should affirm the remand of this case back to the District Court to balance the competing interests.

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The Court should refer to the map filed with the joint appendix for the location of Toppenish and Satus Creeks. The applicable regulations are attached hereto as Appendix "A".

[20] Petitioner County, by footnote raises the case of *Holly v. Totus*, ___ F.2d ___, 9th Cir. No. 85-4436 (9th Cir.), cert. denied 98 L.Ed.2d 47 (1987), as a case of "particular relevance," citing a potential conflict between water and land control on the Yakima Reservation. While *Holly, supra*, raises a potential for such conflict with regard to waters in excess of the total Yakima Treaty secured needs, the holding clearly recognizes by implication the authority of the Yakima Nation to assure that its full treaty needs are met before non-Indians may secure water. Implicit in the holding is the Yakima Nation's authority

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III. THE YAKIMA NATION BELIEVES THE *MONTANA* CASE SETS FORTH AN UNPRECEDENTED DEPARTURE FROM BOTH PRE-*MONTANA* AND POST-*MONTANA* DECISIONS AND SHOULD NOT BE CONTROLLING TO THIS CASE.

A. The *Mazurie-Wheeler-Colville* Line of Cases Provide a Better Reasoned Test of Tribal Sovereignty.

The Yakima Nation and all other Indian tribes are vitally concerned as to which aspects of retained inherent sovereignty this Court now recognizes. This Court established generally accepted concepts for tribally retained sovereignty in several cases before *Montana*. The *Montana* case then departed from previous decisions of this Court. This confusion was then compounded by opinions of this Court subsequent to *Montana*.

One of the key cases in which this Court has set forth guiding principles of inherent sovereignty is *United States v. Wheeler, supra*. Even though the issue for resolution in *Wheeler* centered around a tribal member, this Court provided significant statements about the extent of tribal jurisdiction over non-members. The *Wheeler* case, 435 U.S. at 323, provided what the Yakima Nation believes is the key test and the starting point for resolution of this issue and which bears repeating:

> "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of the dependent status."

This concept has been followed in post-*Montana* cases including *Iowa Mutual Ins. Co. v. LaPlante, supra*, and *Merrion v. Jicarilla Apache Tribe, supra*. Using this basic

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to regulate water use on fee lands to insure that such use does not prevent the Yakimas from receiving their full treaty share. Only after that regulation has occurred may the state make any attempt at regulatory authority.

premise, the Yakima Nation believes the true issue of this case should be stated: Has the sovereign power of the Yakima Nation to provide land use and zoning authority to non-member owned fee lands on its reservation been withdrawn by treaty, statute or by implication as a result of the Yakima Nation's dependent status?

B. The *Treaty With the Yakimas* Did Not Withdraw this Power.

United States v. Winans, supra, has laid to rest any argument that the *Treaty With the Yakimas*, can serve as the basis to conclude the Yakima Nation does not have such sovereign power. The *Treaty With the Yakimas* was not a grant of rights to the Indians, but was a grant of rights from them. In 1855, Governor Stevens did not discuss with the Yakima Nation that in the short span of 40 years, the Great White Fathers, (Congress) would allow the reservation lands to be parcelled and sold to non-Indians. Governor Stevens promised exactly the contrary. In the *Treaty With the Yakimas*, the Yakima Nation did not grant or give up its sovereign right to include reservation lands owned by non-Indians in any comprehensive tribal regulatory scheme.[21]

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[21] In *Montana*, this Court carefully considered the 1861 and 1868 Crow treaties, determining that in the establishment of the Crow Reservation the United States did not *convey* to the Crow tribe the Big Horn Riverbed. In its decision in *Montana*, describing the establishment of the Crow Reservation, the Court described the actions of the United States as "giving" and "conveying" the Reservation to the Crow tribe. The Court constructed this language and its effect on the Crow claim of exclusive jurisdiction with the Choctaw treaty in which this Court held that the Choctaw did indeed own the bed of a navigable river on its reservation. *Montana*, at 555, footnote 5.

This Court made clear that different treaties reserved different rights. The Court must make the same distinction in this

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C. There Is No Withdrawal or Divesture of the Yakima Nation's Inherent Power to Zone Non-Member Fee Lands by Implication.

We next consider whether this aspect of sovereignty has been lost or withdrawn by implication as a result of the Tribe's dependent status. In *United States v. Wheeler*, at 326, this Court followed the above-cited sovereignty test with a discussion of those sovereignty aspects which have been lost by implication.

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those

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case. The Crow treaty makes no mention of either specific cession of lands it owned prior to the treaty, nor does it contain clear language of reservation of all lands and authority not ceded.

In contrast, Article I of the Yakima treaty provides:

> "The aforesaid confederated tribes and bands of Indians hereby *cede, relinquish and convey to the United States all their right, title and interest in and to the lands occupied and claimed by them*, . . .

Article II, which defined the reservation provides:

> "There is, however, *reserved from the lands above ceded* for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to-wit:
>
> (description omitted)."

It is clear that the Yakima treaty, as contrasted with Crow reserved lands *owned* by the Yakima Tribe and which had never become lands or territories of the United States. Under the Crow treaty, the Court could find that under the United States *conveyance* to the Crow Tribe that Crow had retained no authority over lands it did not own at the time of the treaty. Conversely, under the Yakima treaty, this Court must find that the Yakimas reserved unto themselves, by specific treaty language, all of their inherent sovereignty. This Court should distinguish the application of *Montana* to the Yakima Reservation.

> involving an Indian tribe and non-members of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy . . . They cannot enter into direct commercial or governmental relations with foreign nations . . . And, as we have recently held, they cannot try non-members in tribal courts." (Citations omitted.)

The *Montana* opinion, as well as petitioners and their supporting amici, takes the first sentence of this *Wheeler* quote out of context. The Yakima Nation submits that this statement must be read in its entirety to be correctly understood. To date, this Court has identified only three areas where tribes have been divested of sovereign powers by implication. This case does not involve a question of Indian efforts to alienate their land, nor does it involve a contract with a foreign nation. Furthermore, this case does not relate to the third circumstance, the trying of non-members in tribal courts. *Oliphant v. Suquamish Indian Tribe, supra*, ruled that Indian tribes have lost *by implication* the power to charge non-members with crimes, guilt or innocence to which are determined in tribal court. Contrary to the arguments of petitioners, *Oliphant* is narrowly limited to a discussion of the criminal jurisdiction of tribes over non-members. *Oliphant* carefully details why Indian tribes have lost by implication the sovereign power to try non-members in criminal proceedings. However, *Oliphant* did not depart from the *Worcester/Mazurie* principles of tribal sovereignty. The subsequent *Wheeler* opinion undoubtedly puts the *Oliphant* decision in perspective, recognizing that the *Oliphant* ruling fits clearly within one of the recognized exceptions to overall tribal sovereignty. The Yakima Nation has not made non-member violations of the tribal zoning code a crime or criminal act. The Yakima Nation has provided for enforcement of the zoning code by way of civil proceeding. As such, the *Oliphant* logic is not applicable to this case.

If *Wheeler* had been the final piece to this puzzle, the issue would be easy to resolve. However, this Court has followed *Oliphant* and *Wheeler* with *Washington v. Colville Tribes*, 447 U.S. 134 (1980), which in turn was followed by an unprecedented departure from the *Mazurie-Wheeler* rationale in *Montana v. United States, supra.*

In *Colville*, this Court stated that "tribal powers *are not implicitly divested* by virtue of their dependent status." That divesture is found "in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government. *Colville* at 153. This expression is not inconsistent with the *Wheeler* test and reflects a restatement of the divesture by implication test. However, nine months later in *Montana*, without mention of the decision in *Colville*, this Court held:

> "exercise of tribal power beyond what is necessary to protect tribal self-government is inconsistent with the dependent status of the tribes, and cannot survive without express congressional delegation."

Montana at 564.

The Yakima Nation disagrees with the implications of this statement. Four cases were cited to support this premise. The Yakima Nation is not willing to accept these four cases as authority for this Court's pronouncement. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) concerned an off-reservation ski resort owned by the tribe and the state's effort to collect a gross receipts tax. The majority opinion[22] in *Mescalero* ruled that New Mexico could lawfully impose its tax upon the off-reservation tribal enterprise. The argument centered over the impact of the

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[22] The Yakima Nation finds it interesting that the dissent from the majority opinion in *Mescalero*, 411 U.S. 145, 159-163, would have invalidated New Mexico's tax as having been preempted by federal law, a result totally inconsistent with the opinion in *Montana*.

Indian Reorganization Act of 1934, and whether fee lands acquired outside the reservation under the provisions of this federal legislation were cloaked with a tax immunity under a pre-emption analysis. This Court provided in *Mescalero* at 148, that "conceptual clarity of Chief Justice Marshall's view in *Worcester v. Georgia* (citation omitted) has given way to a more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of states, Indians and the Federal Government", and sustained the validity of the state tax as not preempted. However, *Mescalero v. Jones, supra*, was not a case involving on reservation sovereignty powers.

A review of the other three cases, *Williams v. Lee, supra*, at 214-220; *United States v. Kagama, supra* at 381-382; and *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 171 (1973) also results in an inability to find support for the *Montana* premise. The Yakima Nation can find no language limiting the existence of inherent tribal powers in these cases. Each of these four cases was a balancing of state versus tribal-federal interests to determine the lawfulness of the application of state law and/or jurisdiction. This is an issue fundamentally different from issues concerning the extent of inherent tribal powers. Prior to *Montana*, Indian tribes were possessed with aspects of sovereignty *not withdrawn* by treaty, statute or dependent status. In *Montana*, Indian tribes have no aspects of sovereignty beyond what was necessary to protect tribal self-government unless there existed *a delegation or grant* of such sovereignty by Congress. This departure from the *Wheeler-Colville* line of authority was not necessary to obtain the *Montana* result. In *Montana*, this Court departed from 150 years of precedent by reversing the

starting point for tribal sovereignty determinations. *Montana* was not a response to congressional legislation, nor was it supported by the federal government. To the contrary, all congressional legislation during the 1970's was directed toward a strong and expansive tribal government. This Court should clarify the often cited statement made in *Montana* and reaffirm the line of the cases from *Worcester* to *Mazurie* and *Wheeler*, a logic that recognizes that most Indian treaties are grants of rights from the tribes to the United States, not grants and powers to the tribes and that Indian tribes possess all aspects of sovereignty not withdrawn.

The Yakima Nation believes this Court's decisions in cases subsequent to *Montana* support the argument that *Montana* should be treated as a momentary or distinguishable divergence from recognized law. See *New Mexico v. Mescalero Apache Tribe*, *supra* at 332; *National Farmers Union Ins. Co. v. Crow*, *supra* at 851; *California v. Cabazon Band of Mission Indians*, 94 L. Ed.2d at 253 and 259; and *Iowa Mutual Ins. Co. v. LaPlante*, 94 L. Ed.2d at 18, 19 and 21, in which this Court stated:

> "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544 565-566 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980); *Fisher v. District Court*, 424 U.S. at 387-389. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the federal government. The proper inference from silence . . . is that the sovereign power . . . remains intact. *Merrion v. Jicarrilla Apache Tribe*, 455 U.S. at 149 n.14."

Unlike the issue of criminal jurisdiction discussed in *Oliphant*, there is no history of a federal assumption that Indian tribes lack such authority. No legislation has been passed by Congress which assumes tribes lack such authority. To the contrary, it can be argued that the Executive branch of the Federal Government has understood that an Indian tribe's authority to regulate fundamental government matters within the entire reservation continue notwithstanding the issuance of fee patents to non-Indians. See Opinions of the Solicitor, Dept. of Interior, Vol. 1, 55 I.D. 14 (October 25, 1934). Under the rationale of the recent cases and *Worcester*, *Williams v. Lee*, *Mazurie*, *Wheeler*, and even *Oliphant*, and under the *Iowa Mutual* interpretation of *Montana* there has been no withdrawal or divesture of the Yakima Nation's sovereign power to provide land use and zoning regulation to non-member owned fee land because of its dependent status,[23] and this Court should uphold this position.

D. The Sovereign Power of the Yakima Nation to Zone Non-Member Fee Land Has Not Been Divested or Abrogated by Statute.

The last inquiry under the *Wheeler* test is whether a statute adopted by Congress has divested or abrogated the tribal authority. Congress has plenary power over tribal relations and tribal lands. *Lone Wolf v. Hitchcock*, *supra*. Congress has the power to bar the exercise of civil jurisdiction by tribes over non-members. The question is whether any such congressional legislation is presently in force.

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[23] If the *Iowa Mutual* interpretation of *Montana* is not the correct test for determination of sovereign powers of Indian tribes which they retain, then the Yakima Nation relies on the record before this Court which establishes that the political integrity and economic security has been threatened by the County's actions which argument is set forth in detail hereinabove.

Petitioners and their amici argue that the sovereign authority of the Yakima Nation to zone non-member owned fee lands was divested by the General Allotment Act. The petitioners contend that the Allotment legislation remains in force insomuch as it has not been specifically repealed. This position fails to properly consider 55 years of subsequent congressional legislation and policy. The policy of allotment was *repudiated* in 1934 by the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. Sec. 461 et seq. The federal repudiation of the allotment debacle has continued subsequent to 1934 as evidenced by the definition of Indian country in 18 U.S.C. Sec. 1151, the Indian Self-Determination and Education Assistance Act of 1974, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. 450 et seq.; Indian Financing Act of 1974, P.L. 93-262, 88 Stat. 77, 25 U.S.C. 1451 et seq.; and Indian Land Consolidation Act of 1983, P.L. 96-459, 96 Stat. 2517, as amended by Act of October 30, 1984, P.L. 98-608, 98 Stat. 3171, 25 U.S.C. Sec. 2201 et seq. Other recent legislation by Congress encouraging the exercise of reservation wide regulatory powers by tribal government include portions of the Federal Insecticide, Fungicide and Rodenticide Act, 92 Stat. 834, 7 U.S.C. Sec. 136(u); The Clean Air Act, 91 Stat. 1402, 42 U.S.C. Sec. 7401, 7474(c); the Safe Drinking Water Act, 100 Stat. 665, 42 U.S.C. Sec. 300j-11; and the Clean Water Act, 100 Stat. 77, 33 U.S.C. Sec. 1377.

The weakness of the petitioners' position becomes glaring when the member owned fee land circumstance is factored into the analysis. If Section 6 of the Allotment Act (25 U.S.C. Sec. 349) was still viable, it would follow that state jurisdiction would extend to tribal members on fee lands. The above-cited authorities demonstrate that the Allotment Act has no vitality or force to provide state

regulatory jurisdiction over tribal members on reservation fee lands. See *Moe, Mazurie,* and *DeCoteau v. District Court,* 420 U.S. 425 (1975). There is no satisfactory authority for the proposition that the Allotment Act has vitality to provide state jurisdiction to non-member fee land, and at the same time, has no continuing vitality to provide state jurisdiction to member-owned fee land. This Court, in *Garcia v. San Antonio Metro,* 469 U.S. 528 (1985), rejected as "unmanageable" judicial tests similar to those proposed by petitioners. The Court recognized that for it to require such tests would result in unauthorized judicial legislation.

Petitioners' reliance upon *Montana v. United States, supra,* is misplaced. Each of the petitioners and several amici cite and/or quote Footnote 9 found in *Montana* at 560, totally out of context. In the footnote, this Court was addressing the Ninth Circuit opinion (604 F.2d 1162) which had held the Crow Tribe could bar hunting and fishing by non-resident owners of fee land on the Crow Reservation. The Ninth Circuit had based its decision on this issue, in part, on the Allotment Acts. This Court rejected the Ninth Circuit holding as to this narrow question, stating that the Allotment Acts could not serve as support for the Ninth Circuit decision allowing the Crow Tribe to bar hunting and fishing by non-resident owners of fee land. The footnote language concerning congressional intent and belief as to the effect of the Allotment Acts must be viewed in this light. This footnote language in no way supports petitioners' argument that the Allotment Acts have a continuing vitality which divests the Yakima Nation of inherent authority to regulate land use and zoning of non-member owned fee lands.

The *Montana* decision itself negates the petitioners' arguments. This Court in *Montana* did not strike down all forms of tribal civil jurisdiction over non-members on fee lands. *Montana* recognized that a tribe has some forms of civil jurisdiction over non-members on fee lands in two broadly specified circumstances. The stated exceptions in *Montana* are not compatible with the argument that the Allotment Acts divest tribes of all inherent authority over non-members on fee land.

The inherent power of the Yakima Nation to regulate the land use and zoning of non-member owned fee land is not divested by the repudiated Allotment Acts. Instead, the determination of whether or not such inherent power can be exercised by the Yakima Nation depends on the test of *Mazurie/Wheeler*, or the above-mentioned *Montana* test and exceptions.

Finally, Public Law 280 (67 Stat. 588) cannot be construed as congressional legislation divesting the Yakima Nation of the power to zone non-member owned fee land. Only Petitioner Brendale argues that Pub. L. 280 constitutes a congressional sanction of the extension of state jurisdiction into Indian reservations. This Court in *California v. Cabazon Band of Mission Indians*, 94 L. Ed.2d, at 254, addressed the jurisdictional extent of Pub. L. 280:

> "In *Bryan v. Itasca County*, 426 U.S. 373 (1976) we interpreted Sec. 4 to grant state jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general regulatory authority. Id. at 385, 388-390. We held, therefore, that Minnesota could not apply its personal property tax within the reservation. Congress' primary concern in enacting Pub. L. 280 was combating lawlessness on reservations. Id. at 379-380. The Act plainly was not intended to effect total assimilation of Indian tribes into mainstream American society. Id. at 387. *We recognized that a grant to states of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values.*" (Emphasis supplied.)

It is clear that Pub. L. 280 is not the answer to petitioners' search for specific legislation divesting tribal authority.

IV. THE EXERCISE OF TRIBAL CIVIL REGULATORY POWER OVER NON-MEMBERS IS NOT AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY.

Petitioners and their amici claim that the exercise of civil regulatory power by the Yakima Nation in the form of zoning non-member owned fee land is an unconstitutional delegation of authority by Congress. To support this contention, petitioners point to that inability of non-tribal members to vote for tribal leaders and participate in tribal government. This Court should continue its rejection of such argument.

Petitioners have failed to properly understand the *Treaty With the Yakimas*, 12 Stat. 951. As pointed out hereinabove, this *Treaty* is not a grant to the Yakimas by the United States. It is a grant from the Yakimas to the United States, the Yakimas retaining all powers not granted. *United States v. Winans, supra.* The *Treaty* reserved inherent sovereignty is, therefore, not a delegation by Congress of authority which is subject to constitutional scrutiny. This Court addressed this issue in *Talton v. Mayes*, 163 U.S. 376 (1896), wherein it reiterated the well settled principle that the Fifth Amendment to the Constitution of the United States is a limitation only upon the powers of the national government which the Constitution called into being. This Court then determined that the powers of self-government enjoyed by the Cherokee Nation existed prior to the Constitution and were not affected by the Fifth Amendment. *Talton v. Mayes*, at 384.

A similar question was addressed by this Court in *United States v. Mazurie, supra.* In that case, the non-

Indians had argued that because they could not participate in tribal government, the Wind River Tribes could not lawfully regulate their liquor sales on fee land within the reservation. Justice Rehnquist rejected this argument relying on *Williams v. Lee, supra,* and upon Article I, Section 8 of the Constitution which gives Congress power to regulate commerce with Indian tribes.

This same form of argument has been made in the cases challenging the lawful authority of Indian tribes to impose taxes on non-members. In *Morris v. Hitchcock,* 194 U.S. 384 (1904), this court considered a tax by the Chickasaw Nation on non-Indian for ownership of livestock within their reservation. The non-Indians had argued that the tribal tax violated the Fourth and Fifth Amendment to the Constitution. Id. at 385. This Court rejected the non-Indian arguments and sustained the validity of the tribal tax. Subsequently, in *Merrion v. Jicarilla Apache Tribe, supra,* this Court again upheld the validity of a tribal tax on non-members. Even though the tribal tax was not subject to scrutiny under the fourth and fifth amendments, this Court recognized a very real and practical limitation upon tribal authority stating:

> "Of course, the Tribe's authority to tax non-members is subject to constraints not imposed on other governmental entities; *the Federal Government can take away this power . . .*
> (Emphasis supplied).

Merrion at 141.

The exercise of land use and zoning authority by tribal government over non-member owned fee land is also subject to this ominous constraint. If tribal governments become over zealous or unfair and act in a manner which discriminates against non-members, Congress has the plenary authority to simply take this inherent power away. Such a constraint does temper tribal government

and the record before this Court in this case provides no indication of anything other than a good faith assertion of land use jurisdiction by the Yakima Nation. The constitutional arguments of the petitioners are invalid. Constraints exist which protect non-members from unfair treatment from tribal government should such a problem ever arise.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed, and the case remanded to the District Court as directed by the Ninth Circuit opinion. This Court should direct the District Court to enter an order which provides the Yakima Nation has exclusive authority to regulate the zoning of member owned fee land in the open area of the reservation. Finally, this Court should clarify *Montana v. United States, supra,* and should reaffirm the concept that Indian tribes possess those attributes of sovereignty not withdrawn by treaty, statute or by implication as a result of their dependent status.

Respectfully submitted,

TIM R. WEAVER
R. WAYNE BJUR

Dated: November 4, 1988

APPENDIX A
WAC 173-18-430 Yakima County. Streams

Stream Name	*Quadrangle Name and Size*	*Legal Description*
(1) Ahtanum Creek	Tampico 7 1/2 Wiley City 7 1/2 Yakima West 7 1/2 Yakima East 7 1/2	From confluence of North and South Forks of Ahtanum Creek (Sec.17, T12N,R16E) downstream to mouth at Yakima River (Sec.17,T12N, R19E) excluding those reaches within Yakima Indian Reservation.
(2) Ahtanum Creek (N.Fk.)	*Foundation Ridge* 7 1/2 Pine Mtn. 7 1/2 Tampico 7 1/2	From confluence of Ahtanum Creek North Fork and Ahtanum Creek Middle Fork (Sec. 24,T12N,R14E) downstream to mouth at Ahtanum Creek South Fork (Sec.17,T12N, R16E).
(3) Ahtanum Creek (S.Fk.)	*Pine Mtn.* 7 1/2 Tampico 7 1/2	From confluence of unnamed creek and Ahtanum Creek South Fork (Sec.24,T12N, R15E) downstream to mouth at Ahtanum Creek (left bank only).

Stream Name	*Quadrangle Name and Size*	*Legal Description*
(4) Columbia River*	*Priest Rapids* 15	From the Yakima Firing Center boundary (Sec. 3,T13N,R23E) downstream along the Grant-Yakima County line to Benton County line (Sec.12,T13N, R23E). The flow exceeds 200 cfs MAF at Yakima Firing Center boundary.
(5) Cowich Creek (S. Fork)	*Tieton* 7 1/2 Naches 7 1/2 Wiley City 7 1/2 Yakima 7 1/2 Selah West 7 1/2	From an approximate point (NW 1/4 of NE1/4 Sec. 33, T14N,R16E) downstream through Cowiche Creek to mouth at Naches River (Sec.9,T13N, R18E).
(6) Bumping River*	*Bumping Lake** 15 Old Scab Mtn. 7 1/2 Cliffdel 7 1/2	From U.S.G.S. gaging station (Sec.23,T16N, R12E) downstream to mouth at Naches and Little Naches rivers (Sec.4,T17N, R14E). Exclude federal lands. The flow is over 200 cfs MAF at U.S.G.S. gaging station.

Stream Name	*Quadrangle Name and Size*	*Legal Description*
(7) Little Naches River*	*Lester* 15 Easton* 15 Cliffdell 7 1/2	From confluence of North Fork and Middle Fork Little Naches River (Sec.36, T19N,R12E) downstream to mouth at Naches River (Sec.4,T17N,R14E) Exclude federal lands. The 200 cfs MAF point begins at confluence with Crow Creek (Sec.30,T18N,R14E).
(8) Naches River*	*Cliffdel* 7 1/2 Manastash Lake 7 1/2 Nile 7 1/2 Milk Canyon 7 1/2 Tieton 7 1/2 Naches 7 1/2 Selah 7 1/2	From confluence of Little Naches River and Bumping River (Sec.4,T17N,R14E) downstream to mouth at Yakima River (Sec.12,T13N,R18E). Exclude federal lands. The flow is 200cfs MAF at confluence of Little Naches River and Bumping River.
(9) Rattlesnake Creek*	*Meeks Table* 7 1/2 Nile 7 1/2	From Snoqualmie National Forest boundary (Sec.6, T15N,R15E) downstream to mouth at Naches River (Sec.3, same township). The flow at Snoqualmie N.F. boundary is 200 cfs MAF.

Stream Name	*Quadrangle Name and Size*	*Legal Description*
(10) Tieton River*	*Weddle Canyon* 7 1/2 Tieton* 7 1/2	From west section line (Sec.29,T14N, R15E) downstream to mouth at Naches River (Sec.35,T15N, R16E). Exclude federal lands. The flow is 200 cfs MAF at west section line (Sec.29,T14N, R15E).
(11) Tieton River (S. Fk.)	*White Pass* 15 Rimrock Lake 7 1/2	From the south section line (Sec.23, T12N,R12E) downstream to mouth at Rimrock Lake (Sec.7, T13N,R14E). Exclude federal lands.
(12) Yakima River (cont.)*	*Pomona* * 7 1/2 Selah 7 1/2 Yakima East 7 1/2 Wapato 7 1/2 Toppenish 7 1/2 Granger N.W. 7 1/2 Granger 7 1/2 Sunnyside 7 1/2 Mabton West 7 1/2 Mabton East 7 1/2 Prosser 7 1/2	From the Kittitas County line (Sec.33, T15N,R19E) downstream, excluding all federal lands and Yakima Indian Reservation, to Benton county line (Sec.7, T8N,R24E). The flow exceeds 200 cfs MAF at Kittitas County line.

[Order DE 76-14 § 173-18-430, filed 5/3/76; Order 73-14, § 173-18-430, filed 8/27/73; Order DE 72-13, § 173-18-430, filed 6/30/72.]

(20) (25) (26)

Nos. 87-1622, 87-1697, and 87-1711

Supreme Court, U.S.
FILED
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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER STANLEY WILKINSON

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TABLE OF CONTENTS

Page

I. INTRODUCTION 2

II. CONGRESS HAS DIVESTED THE YAKIMA INDIAN NATION OF THE PRE-TREATY TERRITORIAL AUTHORITY IT CLAIMS OVER NONMEMBERS OF THE TRIBE AND THEIR PROPERTY 3

A. The Tribe Does Not Retain Absolute Civil Power Over Nonmembers Within Reservation Borders 3

B. *Montana v. United States* Correctly Establishes That Congress Generally Divested The Tribe Of Civil Land Use Regulatory Jurisdiction Over Nonmembers On Fee Lands Within Reservation Borders 3

1. *Montana* Is Consistent With Prior Authority 5

2. *Montana* Is Consistent With Congress's Post-Allotment Era Enactments 6

a. 25 U.S.C. § 476 7

b. 18 U.S.C. § 1151 8

c. Recent Statutes 9

3. *Montana* Is Well Reasoned 11

III. CHECKERBOARD LAND USE REGULATORY AUTHORITY WITHIN THE RESERVATION IS NOT A PER SE THREAT TO THE TRIBE'S POLITICAL INTEGRITY, ECONOMIC SECURITY OR HEALTH AND WELFARE 12

TABLE OF CONTENTS—Continued

	Page
IV. THE TRIBE'S PRECONSTITUTIONAL STATUS DOES NOT INSULATE ITS ACTIONS FROM CONSTITUTIONAL SCRUTINY WHEN THE TRIBE EXERCISES GOVERNMENTAL POWER CONGRESS HAS DELEGATED TO IT	16
A. *Talton v. Mayes* Is Not Controlling	16
B. Wilkinson Is Without Electoral Or Effective Judicial Redress For The Tribe's Arbitrary Exercise Of The Power Congress Has Allegedly Delegated To It	17
V. ANY REMAND FOR A BALANCING OF COUNTY AND TRIBAL INTERESTS IN REGULATING NONMEMBER USE OF OPEN AREA FEE LAND WOULD BE A WASTEFUL ACT IN DISREGARD OF THE DISTRICT COURT'S UNREFUTED FINDINGS OF FACT	19
VI. CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Bates v. Clark, 95 U.S. 204 (1877)	6
Buster v. Wright, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906)	5, 6
California Coastal Commission v. Granite Rock Company, 480 U.S. 572, 107 S. Ct. 1419 (1987)	10
Dry Creek Lodge, Inc. v. Arapaho and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981)	18
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. ——, 107 S. Ct. 2378 (1987)	19
Fisher v. District Court, 424 U.S. 382 (1976)	9
Fuentes v. Shevin, 407 U.S. 67 (1972)	5
Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985)	19
Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978)	17, 18
Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9 (1987)	12
Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982)	14
Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919 (D. Mont. 1988)	18
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)	3
Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976)	8, 15
Montana v. United States, 450 U.S. 544 (1981)	*passim*
Morris v. Hitchcock, 194 U.S. 384 (1904)	5
Nevada v. Hall, 440 U.S. 410 (1979)	18
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)	3
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	4, 5, 19
Rendell-Baker v. Kohn, 457 U.S. 830 (1982)	17
Rice v. Rehner, 463 U.S. 713 (1983)	8
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)	6, 7

TABLE OF AUTHORITIES—Continued

	Page
San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 107 S. Ct. 2971 (1987)	17
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	17
Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977)	10, 14
Seymour v. Superintendent, 368 U.S. 351 (1962)	15
Solem v. Bartlett, 405 U.S. 463 (1984)	7, 8
State of Minnesota By Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982)	13
Talton v. Mayes, 163 U.S. 376 (1896)	16
United States v. Antelope, 430 U.S. 641 (1977)	9
United States v. Kagama, 118 U.S. 375 (1886)	9
United States v. Mazurie, 419 U.S. 544 (1975)	6
United States v. Wheeler, 435 U.S. 313 (1978)	3, 11, 16
Washington v. Confederated Bands And Tribes Of The Yakima Indian Nation, 437 U.S. 463 (1979)	8
Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)	8, 11, 12
Wesberry v. Sanders, 376 U.S. 1 (1964)	18
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	3, 13
Williams v. Lee, 358 U.S. 217 (1959)	9, 11, 12

Federal Constitution

Property Clause, Art. IV, § 3, cl. 2	13
Supremacy Clause, Art. VI, § 2	13
Fifth Amendment	16, 17, 19

Statutes, Administrative Regulations, & Court Rules

18 U.S.C. § 1151	8, 9
25 U.S.C. § 331, *et seq.*	4
25 U.S.C. § 476	7
25 U.S.C. § 1901, *et seq.*	9

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 1996	9
25 C.F.R. § 1.4	10
Fed. R. Civ. P. 52(a)	13, 16, 20

Other Authorities

Cohen's Handbook of Federal Indian Law (1982 ed.)	5
Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I, 484 (M. 27810)	7
Op. Sol., 55 I.D. 14 (1934)	7

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REPLY BRIEF OF PETITIONER STANLEY WILKINSON

I. INTRODUCTION.

The responses of the Tribe and its *amici* to petitioner Wilkinson's arguments revolve around four primary themes.

First, they assert that Congress has not divested the Tribe of its original, pre-Treaty power to manage comprehensively all of the land within the Tribe's reservation. Because *Montana v. United States*, 450 U.S. 544 (1981), which reflects but one instance of this Court's repeated recognition that Congress has modified Chief Justice Marshall's absolute view of tribal sovereignty, stands as an obstacle to that position, they attack *Montana* as "unprecedented" and as a "momentary" "divergence from recognized law", the authority for which the Tribe is "unwilling to accept." *See Brief of Respondent, Yakima Indian Nation* ("*RB*") at 36, 40 & 42.

Second, they urge that under *Montana* the Tribe necessarily possesses the power to regulate all land within the reservation because a checkerboard scheme of civil land use regulatory jurisdiction *by definition* interferes unacceptably with the Tribe's political integrity, economic security and health and welfare. *See, e.g., RB* at 31, 43 n.23.

Third, they assert that the pre-Constitutional status of Tribal power stands as an absolute barrier to the constitutional concerns of nonmembers of the Tribe *in this case*. *See, e.g., RB* at 47-49.

Fourth, they give short shrift to the District Court's findings of fact and assert that if the County of Yakima has any land use authority over reservation fee lands, *Whiteside II* should be remanded to the District Court for the balancing the Ninth Circuit envisoned between Tribal and County interests in exercising such power in the open area. *RB* at 31-35.

None of these contentions withstands scrutiny.

II. CONGRESS HAS DIVESTED THE YAKIMA INDIAN NATION OF THE PRE-TREATY TERRITORIAL AUTHORITY IT CLAIMS OVER NONMEMBERS OF THE TRIBE AND THEIR PROPERTY.

A. The Tribe Does Not Retain Absolute Civil Power Over Nonmembers Within Reservation Borders.

This Court has recognized both that tribal authority includes a " 'significant geographical component' " defined by reservation boundaries, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983), *quoting, White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980), *and* that in the jurisdictional context "the reservation boundary is not absolute." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 151. The Tribe's assertion in this case that it retains a comprehensive power coextensive with reservation borders over all land use thus represents an unacceptable return to the absolutism this Court eschewed when it "long ago departed from the 'conceptual clarity of Mr. Chief Justice Marshall's view in Worcester'. . . and . . . acknowledged certain limitations on tribal sovereignty." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 331, *quoting, Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

B. *Montana v. United States* Correctly Establishes That Congress Generally Divested The Tribe Of Civil Land Use Regulatory Jurisdiction Over Nonmembers On Fee Lands Within Reservation Borders.

Wilkinson does not take issue with the principle that the Tribe retains "those aspects of sovereignty not withdrawn by treaty or statute or by implication as a necessary result of [its] dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). *Compare Wilkinson Brief* ("*WB*") at 27 *with RB* at 24 & 36-37. Application of that principle, however, requires recognition that the Tribe no longer possesses the full civil regulatory power it asserts over nonmembers.

This Court's explanation in *Montana* of the impact of the Allotment Acts on treaty provisions setting land apart for a tribe's "exclusive use and benefit," establishes unmistakably that reservation borders no longer define a comprehensive tribal civil regulatory power over nonmembers and their fee land: *"It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction . . ."* *Montana*, 450 U.S. at 559 n.9.[1]

Similarly contrary to the Tribe's assertion (*RB* at 39), this Court has determined that the implicit divestiture principle of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (which provides both that "Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns" and that the governance of nonmembers is one of those "inconsistent" powers, *Montana*, 450 U.S. at 565), applies in the civil context: "Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign

[1] Congress's allotment policy, embodied in both the General Allotment Act of 1887, 25 U.S.C. § 331 *et seq.*, and in the special Yakima Reservation allotment enactments, is central to this case. *See WB* at 5-9. *Amici* Colville Tribe, *et al.*, have made the unfounded assertion, contrary to the undisputed evidence the *Yakima Nation* submitted below (Tr. 556, 557; Ex. 248), that the Yakima reservation was alloted solely pursuant to "special treaty provisions." *Colville Brief* at 10 n.10. The unrefuted evidence of record belies this assertion. An historian of the Yakima Nation, a member of the Tribe whose work *the Tribe* relied upon below to establish the impact on the reservation of the Allotment Acts, refutes that position (Ex. 248 at 59-60), and it should not be given credence here.

In a related matter, *Amici* Colville Tribe makes a similarly unexamined argumentative assertion that "petitioners maintain that land ownership patterns on reservations have remained static since the effects of the Allotment Act were noticed." *Colville Brief* at 11 n.11. This could not be more inaccurate; petitioner Wilkinson's arguments, and his statement of the case, highlight the evolution of the reservation, including the Tribe's post-Allotment Act reacquisition of fee land. *See, e.g.*, WB at 16, 36-38 & n.11.

powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* (footnote omitted). This reasoning is entirely consistent with this Court's recognition that "unwarranted intrusions on . . . personal liberty," *Oliphant*, 435 U.S. at 210, are no less constitutionally offensive because they occur in the civil context. *Cf. Fuentes v. Shevin*, 407 U.S. 67 (1972).

Thus, as the Tribe recognizes, any Tribal claim to full territorial power over nonmembers on fee land must hurdle *Montana*. *Cf. RB* at 36, 38-43, & 44.

This Court's reliance in *Montana* on the continued impact of Congress's allotment policy on tribal civil regulatory power over nonmembers on fee land is undoubtedly correct.

1. *Montana Is Consistent With Prior Authority.* Neither *Morris v. Hitchcock*, 194 U.S. 384 (1904), nor *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), which the Tribe's *amici* rely upon extensively, puts into question this Court's reasoning in *Montana*.

Morris v. Hitchcock did not concern tribal power over nonmembers on fee lands, but rather addressed tribal taxing authority over the cattle of nonmembers that were grazing on trust land pursuant to a business arrangement between tribal members and nonmembers. 194 U.S. at 384-385. Even staunch advocates of tribal authority recognize that any statement in *Morris* relating to tribal power over nonmembers on fee land can only be characterized as dictum. *See Cohen's Handbook Of Federal Indian Law* (1982 ed.) at 256 n.114.

This Court appreciated these distinctions. It cited *Morris* in *Montana*, but *solely* as authority for the proposition—uncontested here—that a tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members . . ." *Montana*, 450 U.S. at 565-566.

Buster v. Wright is similarly unpersuasive. In fact, in *Buster*'s own language, that case affirms the "general rule of law announced in *Bates v. Clark*, 95 U.S. 204, 205, 208, 24 L.Ed. 471, that all the original Indian country remains such *until the Indian title to it is extinguished, and no longer*, 'unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case' ". 135 Fed. at 952 (emphasis added.) *Buster* fell within this exception. *Id.* The fee land in *Buster* was not land the tribe had reserved from a cession of territory and which was thereafter allotted, but rather was land that was patented *to* the Creek Nation *from* the United States. *Id.* at 951. Thus, a "different rule was made applicable" to this special case of the *relocated* Creek Nation (one of the Five Civilized Tribes), which pursuant to Congress's express intent was extended a power over the fee land of nonmembers that would otherwise have perished with Indian title. *Id.* at 952. Further, *Buster* dealt with the extent of tribal power in regard to a consensual business arrangement—"the privilege which [the Creek Nation] offers to those who are not citizens of its nation of trading within its borders". *Id.* at 949. Thus, it also falls within *Montana*'s "consensual relationship" exception to the general prohibition of tribal regulatory authority over nonmembers on fee lands. *Montana*, 450 U.S. at 565. *See also United States v. Mazurie*, 419 U.S. 544, 557-558 (1975).

2. *Montana Is Consistent With Congress's Post-Allotment Era Enactments.* The Tribe and its *amici* make much of the datum that Congress has repudiated the allotment policy of the nineteenth century, a point this Court specifically acknowledged in *Montana*. 450 U.S. at 559 n.9. This repudiation, which manifests itself in Congress's decision to cease allotting reservation land and to foster tribal self-government, is said to eliminate the *effects* of the allotment process. This is simply untenable. One cannot ignore history. *Cf. Rosebud Sioux*

Tribe v. Kneip, 430 U.S. 584, 615 (1977). Only if Congress has legislated specifically to remove the effect of its prior policy can the Tribe's position stand. Congress, however, has not so legislated.

a. *25 U.S.C. § 476.* As the *amici* States of Arizona, *et al.* show conclusively, the 1934 Indian Reorganization Act's statement that tribes retained "all powers vested . . . by existing law", 25 U.S.C. § 476, did not imply a recognition that tribes possessed comprehensive civil regulatory power over nonmembers on fee lands. Rather, this statement represented a legislative acquiescence, after extensive debate and controversy centering upon this very question, to the proposition that tribes would continue to possess only limited authority regarding nonmembers on fee lands. *See Brief of Arizona, et al.* at 10-16. Almost immediately after passage of the Act, the Executive Branch confirmed this view. *Id.* at 16-20, *discussing*, Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I 484 at 489-491 (M. 27810) (advising that a tribe possessed the inherent power of eminent domain *only* with respect to tribal members). *See also* 55 I.D. 14, 50 (1934) (Interior Department opinion recognizing that nonmembers occupying fee land within a reservation are insulated from tribal authority in regard to rights vested in them by federal law). This Court recognized as much in *Solem v. Bartlett*, 465 U.S. 463, 468 (1984):

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the *Indians* held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had *not* yet been claimed by non-Indians. . . . *Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries.* See Act of June 25, 1948, ch.

645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1982 ed.)).

(Emphasis added.)

b. *18 U.S.C. § 1151.* Congress's enactment in 1948 of the currently effective definition of "Indian Country", 18 U.S.C. § 1151, which this Court referred to in the above quoted portion of *Solem v. Bartlett*, did not erase the impact of the allotment process on the rights of *nonmembers*. *Moe v. Confederated Salish and Kootenai Tribes Of The Flathead Reservation*, 425 U.S. 463 (1976), which preceded *Montana*, establishes only that 18 U.S.C. § 1151 embodies a Congressional intent to displace checkerboard Tribe-State civil jurisdiction over tribal *members* within a reservation. *Id.*, 425 U.S. at 478-479. Section 1151 does not mandate the elimination of checkerboard civil regulatory jurisdiction over nonmembers on fee land. Indeed, *Moe* upholds a *State's* exaction of a tax *within a reservation* from *nonmembers* of a tribe. *Id.*, 425 U.S. at 481-483. *WB* at 40 n.12. *See also Rice v. Rehner*, 463 U.S. 713, 721 (1983) (tribal sovereignty is implicated by state regulation of alcohol "only insofar as the State attempts to regulate . . . sale of liquor to other members of the Pala Tribe on the Pala Reservation") & *id.* at 720 n.7 ("[r]egulation of sales to non-Indians or nonmembers of the Pala Tribe simply does not 'contravene the principle of tribal self-government' "); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980) (holding that a state tax on nonmembers within a reservation does not transgress the doctrine of tribal self-government "for the simple reason that nonmembers are not constituents of the governing Tribe"); *Washington v. Confederated Bands And Tribes Of The Yakima Indian Nation*, 439 U.S. 463, 501 (1979) ("classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States").

This reading of section 1151 comports with this Court's repeated recognition that the relations among the federal government, the Indian tribes and the States ultimately turn on "the unique status of Indians as 'a separate people' with their own political institutions". *United States v. Antelope*, 430 U.S. 641, 646 (1977). *See also, e.g., United States v. Kagama*, 118 U.S. 375, 381-382 (1886) (Indian tribes constitute a "separate people, with the power of regulating their internal and social relations").

Congress has recognized that the integrity of a tribe depends on its ability to govern itself under its own laws, *Williams v. Lee*, 358 U.S. 217, 220 (1959); to determine its membership and enforce its domestic customs, *e.g., Fisher v. District Court*, 424 U.S. 382 (1976); The Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.;* to preserve its unique religious and cultural heritage, *e.g.,* The American Indian Religious Freedom Act, 42 U.S.C. § 1996; and to prevent nonmember activities that threaten such core values, *Montana*, 450 U.S. at 564-566. The broad reading of section 1151 the Tribe and its *amici* urge is unnecessary to achieve any of these ends. It also reflects an unwarranted contention that recognition of County authority over nonmembers occupying fee land is tantamount to disestablishment of the reservation. *See, e.g., Brief Of The Colorado River Indian Tribes* at 12. This falsely paints petitioner Wilkinson as an extremist. Wilkinson's point is more modest and far less inflammatory: the Tribe undoubtedly retains certain powers "over non-Indians on [its] reservation[ ], even on non-Indian fee lands." *Montana*, 452 U.S. at 565. The power the Tribe here asserts, however, is not one of them. *Id.*

c. *Recent Statutes.* Congress's more recent enactments, *see, e.g., RB* at 44, foster tribal *self*-government and independence, but do not undermine *Montana*'s recognition of the continued impact of Congress's former allotment policy. None of the statutes the Tribe cites displace State and local land use regulatory jurisdiction over

nonmembers on fee land. The federal environmental statutes the Tribe cites are particularly apt.

There is a clear distinction between environmental regulation and local land use planning. *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572, 107 S. Ct. 1419, 1428 (1987) (land use chooses particular uses for land; environmental regulation requires that damage to the environment is kept within given limits). Congress, fully cognizant of this distinction, has in the statutes the Tribe cites extended to Indian tribes certain environmental regulatory authority over all reservation land, but has not provided for a tribe's authority over land use.[2] In implicit recognition of this approach, the Department of the Interior, Bureau of Indian Affairs ("BIA") has provided for displacement of State land use authority only over *trust* land:

> § 1.4. State and local regulation of the use of Indian property.
>
> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community *that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.*

25 C.F.R. § 1.4(a) (1988) (emphasis added). *See also Santa Rosa Band v. Kings County*, 532 F.2d 655, 664-666 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). To assert, as certain *amici* of the Tribe do, that zoning authority is merely a surrogate for environmental regu-

[2] The record shows as well that timber operations on fee land in the closed area is subject to State forestry practices regulation. Br. Tr. 606; *WB* at 9-10.

lation, *see, e.g., Colville Brief* at 28, is to ignore this plain distinction.

In fact, as the appendix to petitioner Brendale's opening brief shows, after the local office of the BIA sanctioned the Tribe's closure of the roads into the "closed area" of the reservation, the Assistant Secretary of Indian Affairs reversed that decision. He did so because the BIA is not authorized under federal law to implement such tribal land use controls. *Brendale Brief* at 1a-5a. The Tribe and every one of its *amici* fail even to cite this ruling, preferring to rely solely on the Tribe's unilateral decision to close part of the reservation. *See RB* at 4. Their silence cannot erase this ruling's impact. No longer can the Tribe claim express federal endorsement of the line it drew arbitrarily across roads that under federal law are accessible to all citizens. Thus, not only are the general statutes the Tribe cites unsupportive, but the Executive Branch has expressly refused to endorse the power the Tribe claims.

3. *Montana Is Well Reasoned. Montana* is not an anomalous decision.

Montana's requirement that there be an express Congressional delegation of authority for a tribe to exercise "power beyond what is necessary to protect tribal self-government", 450 U.S. at 564, does not contradict what the Tribe characterizes as the *Colville/Wheeler* formulation that tribes retain those powers that Congress has not explicitly or implicitly divested. *See RB* at 40. *Montana* speaks of the need for delegation in the context of its explanation that Congress can divest a tribe of a given power, and once it has, the Tribe cannot reacquire it absent Congress's intervention. *Montana* cites for this proposition that portion of *Williams v. Lee* that includes the statement "*absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358

U.S. 217, 220 (1959) (emphasis added). *Cf. Montana*, 450 U.S. at 564, *citing*, *Williams v. Lee* at 219-220. *See also Washington v. Confederated Tribes Of The Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (a tribe is divested of power when its exercise "would be inconsistent with the overriding interests of the National Government").

Montana's discussion of the need for express Congressional delegation should therefore not be understood as establishing a false dichotomy between a view of tribes as original sovereigns vs. tribes as *solely* possessors of delegated authority. In the contested language, *Montana* was not addressing a tribe's power pre-divestment; the phrase in question merely states how a tribe divested of a certain power may come to possess it anew.

Montana is also not out of step with such recent cases as *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987). *LaPlante* recognizes that tribal "[c]ivil jurisdiction over [the "activities of non-Indians on reservation lands"] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 17. *Montana*'s assertion that the Allotment Acts are such a specific federal statute, 450 U.S. at 559 n.9, does not contradict *LaPlante*. It is merely an example of an instance the *LaPlante* language envisions.

III. CHECKERBOARD LAND USE REGULATORY AUTHORITY WITHIN THE RESERVATION IS NOT A PER SE THREAT TO THE TRIBE'S POLITICAL INTEGRITY, ECONOMIC SECURITY OR HEALTH AND WELFARE.

The Tribe and its *amici* assert that because the Tribe admittedly possesses zoning jurisdiction over all reservation trust land, the County's exercise of zoning authority over nonmember fee land within the reservation necessarily interferes with the Tribe's authority and as a matter of law so threatens its political integrity as to bring

the case within the *Montana* exception designed to preserve tribal self-government. *RB* at 17. There are several fatal difficulties with this assertion.

First, it finds support *not* in the facts of record, but in the Tribe's—and the Ninth Circuit's—political view that comprehensive zoning power is "fundamental to a local government" and therefore *must* be an attribute of the Tribe's authority. *RB* at 32. In contrast, the District Court found as fact that

> [T]here is *no evidence whatsoever* presented in this case to be the basis for a finding that the exercise by Yakima County of its zoning jurisdiction over the deeded land in the Open Area would interfere with the political integrity, economic security, or health or welfare of the Tribe.

W. Pet. at 99a (emphasis added). *See also* Fed. R. Civ. P. 52(a).

It is inappropriate to rely on platonic notions of what, by some lights, tribal authority ideally entails, when this Court has clarified repeatedly that tribal authority is not subject to blanket definition. "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). To posit Tribal authority in derogation of the facts of record and based on a political presupposition concerning the benefit of comprehensive land use power, is to transform *Montana*'s *exception* for authority *necessary* for a Tribe's maintenance of political integrity into little more than a reification of one view of the police power.[3]

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[3] Moreover, to uphold the Tribe's assertion of a *per se* entitlement to zoning authority over non-Indian owned land would be anomalous—it would be to recognize a power in the Tribe greater than the analogous power the United States possesses under the property and supremacy clauses to regulate non-federal land. *See State of Minnesota By Alexander v. Block*, 660 F.2d 1240, 1249 & n.18 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (Congress

Second, the Tribe's assertion of the need for comprehensive land use regulatory power in the open area flies in the face of the District Court's express finding that the County's zoning is more protective of agriculture, the preservation of which is the admitted object of Tribal open area zoning, than is the Tribe's. *See W. Pet.* at 53a, ¶ 9; *RB* at 7.[4] It is simply inappropriate to ignore the facts of record and attempt to justify comprehensive Tribal land use authority based upon general assertions that other States or Counties allegedly have a "less than normal concern" for regulating reservation land.[5] This is political rhetoric that distorts *this case*, wherein the District Court expressly related its observation of the County's sensitivity to Tribal concerns. *W. Pet.* at 100a. This case is thus distinguishable from *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900, 903 (10th Cir. 1982), where the "absence of any [state] land use control over lands within the Reservation" might justify the impression of local government's alleged indifference.

It is also inappropriate to ignore the clear record that County authority in this case is circumscribed by State law, and thus that the Tribe is safeguarded from the danger of local prejudice. *See, e.g.*, Tr. 494-495 (the County treats the Tribe as a "consulted agency" under Washington's Environmental Policy Act); *WB* at 13. *Cf. Santa Rosa Band of Indians v. Kings County*, 532 F.2d at 664.

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has no plenary authority over non-federal land, but may regulate conduct on such land *only* if Congress demonstrates that it *must* exercise such power to protect federal property).

[4] Contrary to the Tribe's assertion (*RB* at 8), Wilkinson certainly does not contend that the County acted exclusively in regulating reservation land. Wilkinson discussed the Tribe's regulatory history in his brief. *WB* 14-15. It is the propriety of this regulation, not its existence, that is at issue.

[5] *See, e.g., Standing Rock Sioux Brief* at 9. *See also Fort Berthold Tribes Brief* at 10-12. Eleven States and an untold number of counties and cities are concerned enough to have filed briefs here.

Third, the concern expressed in *Moe v. Confederated Salish and Kootenai Tribes*, that checkerboard jurisdiction is impractical because it would require enforcement personnel " 'to search tract books in order to determine whether criminal jurisdiction' " existed, 425 U.S. at 478, *quoting, Seymour v. Superintendent*, 368 U.S. 351, 358 (1962), should not be read as a broadly controlling assessment of what tribal governmental efficiency legally requires. As a practical matter, *Moe's* observation is inappropriate in this context; recourse to maps is a regular, necessary aspect of the application and enforcement of land use regulations. Moreover, land use regulation does not present the need for immediate, possibly life-and-death response determinations essential in the area of criminal jurisdiction.

Ultimately, any inefficiency attributable to checkerboard zoning jurisdiction is the necessary result of pressing, paramount concerns about the intent of Congress and the Constitutional rights of United States citizens. Moreover, if checkerboarding proves as inefficient as the Tribe asserts, it should be an impetus leading the parties to a cooperative, political resolution of what in truth is essentially a political question of local land use control. *Montana* does not preclude such an approach; it merely recognizes the limits Congress has placed on a tribal power that would otherwise be regularly exercised over disenfranchised citizens.

Fourth, and most telling, the Tribe's assertions about the inefficiency, peril, and general unacceptability of checkerboard zoning authority are absolutely inconsistent with the Tribe's simultaneous insistence that *its* zoning scheme excepts from its reach all the incorporated cities in the open area. *See RB* at 7 n.6, 12 n.9, 14 n.10, 25 n.15 & 31. The Tribe has, in its words, *chosen*—presumably as the only politically expedient option—to create a checkerboard scheme of its own, carrying with it all the potential for conflict that it finds offensive in the County's regulation of the open area. This is not a

mere academic objection. Taking the Tribe at its word, it appears that its choice illustrates the core of Wilkinson's objection: questions of local land use planning theory are essentially political, and thus, absent the compelling factual showing *Montana* requires, it is not for the judiciary to posit in the Tribe a comprehensive zoning power over nonmember fee land. The facts of record as found by the District Court should determine the extent to which there is a need for Tribal authority over nonmember fee land in this case, and any reassessment of those facts must be made under the constraints of Federal Rule of Civil Procedure 52(a). *Cf. Montana*, 450 U.S. at 564 & 566 ns. 13, 15 & 16.

IV. THE TRIBE'S PRECONSTITUTIONAL STATUS DOES NOT INSULATE ITS ACTIONS FROM CONSTITUTIONAL SCRUTINY WHEN THE TRIBE EXERCISES GOVERNMENTAL POWER CONGRESS HAS DELEGATED TO IT.

A. *Talton v. Mayes* Is Not Controlling.

The Tribe aserts that *Talton v. Mayes*, 163 U.S. 376 (1896), precludes Wilkinson from successfully contending that the Tribe's exercise of civil regulatory power over nonmembers is subject to scrutiny under the Fifth Amendment. *See RB* at 47-49. The Tribe's response misperceives the issue presented.

It is uncontroverted that *Talton v. Mayes* establishes only that a tribe's pre-Constitutional status insulates its activities from Constitutional scrutiny when the tribe is exercising its *original* authority. Wilkinson's argument proceeds from this assumption to the next, unanswered question: whether a tribe that is divested of a given power, but regains it by Act of Congress, would thereafter be an arm of the federal government when it exercises that power. *See United States v. Wheeler*, 435 U.S. 313, 328 n.28 (1978).

It is Wilkinson's position that Congress, both in the Allotment Acts and as a necessary, implied condition of

its recognition of the Tribe's dependent status, divested the Tribe of the broad, civil authority the Tribe claims over nonmembers and their fee land. *Montana*, 450 U.S. at 564. The Tribe contests this, but also asserts that Congress has repudiated the assimilationist policies underlying those Acts, and in practical effect has restored to the Tribe whatever the Allotment Acts took away. *RB* at 44.

If this Court proves the Tribe correct in its latter assertion, the question Wilkinson frames becomes necessary to decide.

B. Wilkinson Is Without Electoral Or Effective Judicial Redress For Arbitrary Tribal Exercise Of The Power Congress Has Allegedly Delegated To It.

It is uncontested that Wilkinson, while allegedly subject to the Tribe's governmental power of land use control,[6] is nonetheless disenfranchised from all participation in Tribal government. The only justification for this is a matter of blood: Wilkinson is not a member of the Tribe. It is similarly uncontested that, while the Tribe's zoning ordinance purports to subject Wilkinson to outright expulsion from his home, (Jt. App. 56), he is without access to direct judicial review of Tribal land use decisions mandating that penalty (Jt. App. 54). *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). *See also* RB at 28 n.17 (asserting the Tribe's immunity from suit).

These stark deprivations are not in any way ameliorated by the irrelevant assertions of the Tribe's *amici*

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[6] Land use control is undoubtedly a core, traditional governmental activity. *See, e.g., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 72 n.8 (1978). The Tribe's exercise of such a federally delegated power should cause it to assume the status of a governmental actor, triggering the application of the Fifth Amendment. *Cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S.Ct. 2971, 2985 (1987); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

that *other* tribal constitutions extend nonmembers certain rights, *Swinomish Brief* at 8; that *other* tribes provide nonmembers representation in tribal land use planning bodies, *see, e.g., Colville Brief* at 13 n.14; by the specious assertion that the "ability to vote" is not an "essential" protection of a landowner such as Wilkinson who *resides* on the land subject to the Tribe's control, *id.* at 13;[7] or by the unhelpful suggestion that Wilkinson could possibly prove an "offsetting" claim if he is sued by the Tribe, or that he might be able to sue a tribal official acting outside the scope of official authority, *see Brief of Colorado River Indian Tribes* at 29.

The hard truth is that Wilkinson is without effective redress. The situation of citizens such as Wilkinson has not escaped the attention of the lower federal courts, some of which have felt compelled to go almost unseemly far in distinguishing this Court's authority to provide redress. *See, e.g., Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981); *Little Horn State Bank v. Crow Tribal Court*, 690 F. Supp. 919 (D. Mont. 1988). These cases create an unmistakable tension in the law bred of an awareness of the fundamental and unacceptable incongruity of Congress subjecting citizens of a Nation founded on the principle that the "sovereign governs only with the consent of the governed," *Nevada v. Hall*, 440 U.S. 410, 426 (1979), to the delegated, unchecked authority of an alien power.

The only defense the Tribe offers to these facts is that Congress can once again divest the Tribe of the power

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[7] *Cf. Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live"). *See also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 72 n.8 (1978) (casting significant doubt on the constitutionality of a municipality's exercise of the "vital and traditional" authority to "zone property for various types of uses" when those subject to that power are disenfranchised).

it now exercises if the Tribe goes too far. *RB* at 48-49. This conveniently ignores the interim harm. *See, e.g., First English Evangelical Luthern Church of Glendale v. County Of Los Angeles*, 482 U.S. ——, 107 S.Ct. 2378 (1987). It also begs the question of whether Congress is constitutionally free to delegate such power subject only to a political check. *Cf. Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985). The Tribe offers as defense nothing less than insulation of Congress from the constraints of the Fifth Amendment. The only prudential response is that of this Court in *Oliphant* and *Montana* pretermitting this question: Congress has divested the Tribe of the broad power it seeks here, and because of the United States's "great solicitude" that its citizen's liberty be protected, that Tribal power remains moribund absent the compelling factual showing *Montana* requires.

V. ANY REMAND FOR A BALANCING OF COUNTY AND TRIBAL INTERESTS IN REGULATING NONMEMBER USE OF OPEN AREA FEE LAND WOULD BE A WASTEFUL ACT IN DISREGARD OF THE DISTRICT COURT'S UNREFUTED FINDINGS OF FACT.

The Tribe asserts that if its attack on *Montana* fails, this Court should affirm the Ninth Circuit's remand of Wilkinson's case (*Whiteside II*) to the District Court for a balancing of the competing interests of County and Tribe to regulatory authority over nonmember fee land in the open area. This position reflects at least three crucial errors.

First, the Tribe (*RB* at 32) incorrectly asserts that the County failed to identify any off-reservation impact of Tribal or County authority in the open area. There is strong testimony in the record detailing the off-reservation importance to Yakima County of the preservation of the agricultural characteristics of open area fee land. *See* Tr. 416-423; Ex. 244; *WB* at 10-11. In light of this evidence, the District Court found specifically that Yakima

County's open area zoning is "expressly designed to protect the County's valuable agricultural land and other resources." *W. Pet.* at 52a, ¶ 7.

Second, the District Court has already assessed the factual impact of checkerboard jurisdiction and found that it was neither difficult nor impossible to administer. *W. Pet.* at 97a.

Third, the Tribe and its *amici* ignore that the District Court has already accomplished all the balancing that can be done. The District Court determined that the Tribe presented "*no evidence whatsover*" that could support the Tribe's assertion that County regulatory authority interfered with its political integrity, economic security, or health or welfare. *W. Pet.* at 99a (emphasis added). This is unequivocal. The Tribe has nothing to bring to the scales; only the most cavalier disregard of Fed. R. Civ. P. 52(a) can alter the District Court's decision.

VI. CONCLUSION.

For the foregoing reasons, and those Wilkinson has previously briefed, this Court should grant the relief Wilkinson requested in his opening brief.

Respectfully submitted on December 2, 1988.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER PHILIP BRENDALE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	2
II. *MONTANA* CORRECTLY HELD INDIAN TRIBES HAVE BEEN DIVESTED OF GENERAL CIVIL REGULATORY AUTHORITY OVER NON-MEMBERS ON FEE LAND WITHIN THE RESERVATION	3
A. The Yakima Nation's dependent status divests it of civil authority over non-members by necessary implication	3
B. *Montana* correctly determined the effect of the General Allotment Act, 25 USC 331, *et seq.* ("Dawes Act") on Respondent's civil regulatory authority	5
C. The *Montana* rule is not contrary to post-Allotment Act legislation	8
III. YAKIMA COUNTY REGULATION OF FEE LAND USE WITHIN THE YAKIMA INDIAN RESERVATION DOES NOT THREATEN OR DIRECTLY AFFECT THE POLITICAL INTEGRITY, ECONOMIC SECURITY, HEALTH AND WELFARE OF THE YAKIMA NATION	10
A. Yakima County land use regulation of Petitioner-Brendale's property does not threaten or directly affect the Yakima Nation's political integrity, economic security, health and welfare	10
B. County zoning of fee land within an Indian reservation does not *per se* threaten or direct the tribe's political integrity, economic security, health and welfare	12
IV. THE YAKIMA NATION'S ASSERTION OF JURISDICTION OVER THE USE OF FEE LAND WITHIN THE RESERVATION IS SUBJECT TO CONSTITUTIONAL LIMITATION	14
V. CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Buster v. Wright, 135 Fed. 947 (8th Cir. 1905) 8
Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 15
Mattz v. Arnett, 412 U.S. 481 (1973) 6
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 12
Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 6, 7
Montana v. United States, 450 U.S. 544 (1981) ....*passim*
Morris v. Hitchcock, 194 U.S. 384 (1984) 8
New Mexico v. Mescalaro Apache Tribe, 436 U.S. 324 (1983) 11
Oliphant v. Suquamish Tribe, 435 U.S. 191 ..... 3, 4, 5
Seymour v. Superintendent, 368 U.S. 351 (1962) .. 6, 7
Solem v. Barnett, 465 U.S. 463, 468 (1984) 6
Talton v. Mayes, 163 U.S. 376, 16 S.Ct. 986 (1906) .. 14
United States v. Mazurie, 419 U.S. 544 (1975) 4, 14
United States v. Wheeler, 435 U.S. 313, 323 (1978) 3, 4, 14
Washington v. Yakima Indian Nation, 439 U.S. 436 (1979) 6
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 12

Federal Constitution:

Fifth Amendment 14, 15

Statutes:

7 USC 136u ("Federal Insecticide, Fungicide and Rodenticide Act) 9
18 USC 1151 ..... 6, 8
25 USC 331, *et seq.* ("Dawes Act") 5, 6
25 USC 348 5
25 USC 450, *et seq.* ("Indian Self-Determination and Education Assistance Act) 9
25 USC 1451, *et seq.*, ("Indian Financing Act of 1974) 9
25 USC 2201 ("Land Consolidation Act of 1983 as amended by the Act of 10/30/84") 9

TABLE OF AUTHORITIES—Continued

Page

28 USC 1360 (PL 280) 6, 7
33 USC 1377 ("Clean Water Act") 9
33 USC 1377(e) (2) 9
42 USC 300j-11 ("Safe Drinking Water Act") 9
RCW Chap. 37.12 7

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REPLY BRIEF FOR PETITIONER PHILIP BRENDALE

I. INTRODUCTION

Respondent-Yakima Indian Nation and its *amici* rely on three (3) primary arguments in asserting the Ninth Circuit's decision in this case should be affirmed.

1. The Yakima Nation asserts it has not been deprived of its authority to regulate land use by non-Indians on fee land within the exterior boundaries of the reservation by treaty, Acts of Congress, or by implication as a necessary result of its dependent status. *Montana v. United States*, 450 U.S. 544 (1981), which found a general divestiture of civil authority, was, therefore, incorrectly decided. [Brief of Respondent-Yakima Indian Nation (RB) 37, 39-43.]

2. The Tribe also argues, assuming *Montana* to be correctly decided and applicable, the "closed area" of the reservation is a distinct and separate portion of the reservation over which the Yakima Nation has exclusive land use jurisdiction and county zoning of fee land within any part of the reservation is a *per se* interference with tribal self-government because county jurisdiction over fee land within the reservation precludes comprehensive reservation and use planning and regulation by the Yakima Nation. (RB 17, 29-31.)

3. The Yakima Nation also asserts imposition of its land use regulations on fee land owned by non-members raises no constitutional questions because land use regulation is a retained sovereign power, *not* a power delegated by Congress and, therefore, exempt from constitutional restrictions. (RB 47-49.)

Each of the arguments of the Yakima Nation and its *amici* misconstrue the holdings of this Court as well as the intent and effect of the various statutes they rely on and must be rejected.

II. *MONTANA* CORRECTLY HELD INDIAN TRIBES HAVE BEEN DIVESTED OF GENERAL CIVIL REGULATORY AUTHORITY OVER NON-MEMBERS ON FEE LAND WITHIN THE RESERVATION.

A. The Yakima Nation's dependent status divests it of civil authority over non-members by necessary implication.

The Yakima Nation acknowledges the Tribe's sovereign powers have been limited to "those aspects of sovereignty not withdrawn by treaty or statute or by implication as a necessary result of their dependent status". *United States v. Wheeler*, 435 U.S. 313, 323 (1978). (RB 36)

The Yakima Nation contends, however, the divestiture of its sovereign power as a result of its dependent status is limited to the powers which the Court specifically enumerated in *Wheeler*, 435 U.S. at 326, which included alienation of land occupied by the Tribe to non-Indians, entering direct commercial or governmental relations with foreign nations and criminal jurisdiction over non-members in Tribal Courts. Immediately before listing those divested powers, the Court stated:

* * * *

> "The areas in which such implied divestiture of sovereignty have been held to have occurred are those involving relations between an Indian tribe and non-Indian members of the tribe." *Wheeler*, 435 U.S. at 326.

* * * *

In addition, *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209, stated:

* * * *

> "Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribe's power to transfer land or exercise external political sovereignty."

* * * *

The list of divested powers contained in *Wheeler* is clearly not inclusive but merely an example of the powers which have been lost through the Tribe's dependent status. This fact was recognized and emphasized in *Montana*, 455 U.S. at 564:

* * * *

> "The exercise of tribal powers beyond what is necessary to protect tribal self-government or control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."

* * * *

Montana, *Wheeler* and *Oliphant* establish a Tribe's dependent status deprives it of jurisdiction over non-members of the Tribe unless one of the *Montana* exceptions is satisfied.

Contrary to the argument of Respondent-Yakima Nation, *Montana* is not inconsistent with *U.S. v. Mazurie*, 419 U.S. 544 (1975). In *Mazurie*, the Court specifically refrained from deciding whether the Tribe's sovereign authority was sufficient for it to regulate the sale of alcohol by non-members on fee land within the reservation. The Court merely held the Tribe, consistent with *Montana*, retained authority over matters which affect the internal and social relations of tribal life, distribution and use of intoxicants affected those relations, and, therefore, its limited, retained authority was sufficient to allow Congress to delegate a portion of its authority under the Commerce clause to regulate the sale of alcohol by a non-Indian on fee land within the reservation. *Mazurie*, 419 U.S. at 557.

Mazurie is also consistent with *Montana* because the non-Indian subjected to regulation in that case was engaged in the sale of alcohol to tribal members on the reservation and subject to tribal regulation pursuant to the "consensual relationship" test established by *Montana*.

Montana's recognition of the Tribe's civil regulatory authority over non-members on fee land was divested by the Tribe's dependent status and the application of the *Montana* rule to preclude tribal land use regulation on fee land in this case is the logical extension of and supported by this Court's ruling in *Oliphant*.

Although *Oliphant* dealt only with criminal jurisdiction over non-members, the United States' guarantees of personal liberty, which the Court held supported the finding criminal jurisdiction was inconsistent with the Tribe's dependent status, fully support the similar divestiture of civil regulatory jurisdiction where, as here, civil property rights protected by the United States Constitution and Bill of Rights are at issue.

B. *Montana* correctly determined the effect of the General Allotment Act, 25 USC 331, *et seq.* ("Dawes Act") on Respondent's civil regulatory authority.

The Yakima Nation and its *amici* argue the Dawes Act, 25 USC 331, *et seq.*, had no effect on a tribe's regulatory authority within the exterior boundaries of a reservation and the *Montana* Court's holding (450 U.S. at 559, N.9) Congress did not intend non-Indians who settled on alienated allotted land to be subject to tribal regulatory authority is erroneous and should be rejected.

Contrary to the Yakima Nation's position, *Montana* correctly found the allotment and alienation of land pursuant to Congressional Allotment Acts changed both the character and jurisdiction of land within the Yakima Reservation.[1]

---

[1] The assertion of the Yakima's Nation's *amici*-Colville Tribe, *et al.*, at 10, n.10 of their Brief, allotments on the Yakima Reservation were pursuant to special treaty provision is completely unfounded. The 1915 allotment to Margaret Smith (Brendale Trial Exhibit 201) from whom Petitioner-Brendale obtained title incorporates the language of 25 USC 348 and was clearly issued pursuant to the General Allotment Act.

tribal regulation is consistent with the general understanding which existed before the 1948 enactment of 18 USC 1151. The alienation of allotted land precludes the Yakima Nation's civil regulatory jurisdiction over allotted fee land within the Yakima Indian Reservation.

Morris v. Hitchcock, 194 U.S. 384 (1984), and *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), appeal dismissed 203 U.S. 599 (1906), relied on by the Yakima Nation's *amici* are *not* contrary to *Montana*. The decision in *Morris* dealt only with a tribe's authority to tax cattle of non-members on rented trust land; authority which the tribe would have pursuant to the "consensual relations" exception to *Montana*'s holding a tribe's dependent status deprives it of civil regulatory jurisdiction over non-members on fee land. See: *Montana*, 450 U.S. at 565-566. Discussions in *Morris* about authority over non-member fee land were completely unnecessary to the decision and are mere *dicta*.

Although "fee land" was involved in *Buster v. Wright*, the tribe's regulatory authority was also within *Montana*'s "consensual relations" exception. 450 U.S. at 565.

C. The *Montana* rule is not contrary to post-Allotment Act legislation.

As described above, *Montana* recognized the Indian Reorganization Act repudiated the allotment policy but did not eliminate congressional intent the alienated, allotted fee land would be free of tribal regulation.

The Indian Reorganization Act merely recognized the tribes had some existing powers but because of the tribes' dependent status and the effect of the Allotment Acts, these powers did not include civil regulatory jurisdiction over non-Indians on fee land within the reservation. The Indian Reorganization Act did *not* restore or delegate sovereign powers previously divested from the tribes. See: Brief of *Amici* Arizona, *et al.*, 15-16.

This Court recognized in *Montana*, 450 U.S. at 459, sovereign powers which are divested by a tribe's dependent status cannot be restored, except by express congressional delegation.

The recent congressional enactments cited by the Yakima Nation and their *amici* do not, as they argue, recognize existing tribal sovereignty over alloted fee land within reservations but appear to delegate congressional authority in specific situations where tribes comply with specific legislatively mandated requirements.

In the Safe Drinking Water Act, 42 USC 300j-11, and the Federal Insecticide, Fungicide and Rodenticide Act, 7 USC 136u, a federal administrative official is specifically authorized to delegate federal authority to Indian tribes. 42 USC 300j-11 limits delegation to tribes complying with specific standards, including the administrator's discretionary determination the tribe is actually capable of performing the functions delegated by the Act.

The Clean Water Act, 33 USC 1377 authorizes the treatment of Indian tribes as states but only to the extent the water resources involved are owned by or held in trust for an Indian tribe, or are owned by members of a tribe and subject to restrictions on alienation if located within the reservation. 33 USC 1377(e)(2).

This delegation of authority, to the extent it may grant a tribe regulatory jurisdiction over non-member fee land, is consistent with *Montana*'s holding sovereign powers, once divested, can only be restored by express congressional enactment.

The other recent acts cited by the Yakima Nation such as the Indian Self-Determination and Education Assistance Act, 25 USC 450, *et seq.*; Indian Financing Act of 1974, 25 USC 1451, *et seq.*, and Land Consolidation Act of 1983 as amended by the Act of October 30, 1984, 25 USC 2201, were all intended to stimulate tribal self-

sufficiency and assist the tribes in developing resources on their land and do not grant or recognize any tribal sovereign powers, particularly any powers or jurisdiction over allotted fee land within the reservation.

Nothing in the above congressional enactments diminishes *Montana*'s clear holding the dependent status of the tribes and the alienation of allotted, patented land within the reservations divested tribes of their jurisdiction over non-tribal member previously allotted fee land.

III. YAKIMA COUNTY REGULATION OF FEE LAND USE WITHIN THE YAKIMA INDIAN RESERVATION DOES NOT THREATEN OR DIRECTLY AFFECT THE POLITICAL INTEGRITY, ECONOMIC SECURITY, HEALTH AND WELFARE OF THE YAKIMA NATION.

A. Yakima County land use regulation of Petitioner-Brendale's property does not threaten or directly affect the Yakima Nation's political integrity, economic security, health and welfare.

The Yakima Nation argues the "open" and "closed" areas of the reservation should be considered separately in determining Yakima County or the Yakima Nation has jurisdiction to regulate land use on non-member fee land within the reservation. *This distinction is completely untenable.*

For purposes of this case, the "closed" area is merely the "Reservation Restricted Area" land use classifications created by the Yakima Nation Zoning Ordinance. Amended Zoning Regulations of the Yakima Indian Nation, Section 23, JA 64-65.[3]

[3] The argument of the Yakima Nation *amici*-Swinomish Tribal Community, *et al.* at 9-13 of its "Brief, *Montana* should apply only where tribal regulations treat members differently from non-members supports Petitioner's position in this case. Section 23 of the "Amended Regulations" purports to exclude non-members from the closed area unless on 5/06/72 they owned land in the area while permitting unrestricted access by tribal members.

Although some physical characteristics and land uses within the reservation restricted, closed area are different from the remainder of the reservation (a distinction preserved by Yakima County's classification of the closed area as "forest watershed" with the open area fee land zoned in various agricultural classifications), the *entire* reservation is subject to and governed by the same treaty, statutes and regulations.[4]

There is absolutely no legal basis for distinguishing the reservation restricted-closed area from the open area of the reservation to determine land use jurisdiction.

The Yakima Nation asserts Yakima County is preempted from regulating land use within the reservation because of Yakima County's limited interest, particularly in the "closed area". The Yakima Nation's preemption argument is *not* relevant because the tribe must first establish it has the authority to regulate non-member fee land within the reservation before any consideration is given to balancing the interests of competing sovereigns.[5]

As pointed out in Brendale's initial Brief, 19-23, the Yakima Nation has completely failed to establish facts necessary to support its zoning jurisdiction consistent with the second *Montana* exception.[6]

[4] As pointed out in Brendale's initial Brief (3, 1a-5a), the BIA's 1972 "Public Notice" closure of the reservation restricted area to non-members has been invalidated.

[5] See: *New Mexico v. Mescalaro Apache Tribe*, 436 U.S. 324 (1983) where the tribe's authority to regulate non-member hunting on reservation land was established before the Court considered whether concurrent state regulation was preempted.

[6] Contrary to the statement in the Yakima Nation's Brief, 4 n.2, although the Trial Court found there were no "permanent residences" in the closed area, Finding of Fact 32, BA 94, the record demonstrates there are, however, numerous permanent residential structures in the closed area which are occupied on a seasonal basis consistent with Brendale's proposed development. (Brendale Brief, 4-5).

The truth is, Yakima County, in compliance with its ordinances and Washington State law has taken tribal interests and concerns into account and required preparation of an Environmental Impact Statement ("EIS") to resolve issues raised by the Yakima Nation before determining whether or not to approve or deny Brendale's application. This process (if permitted to continue to its conclusion) would preclude adverse impacts on tribal interests and demonstrate Yakima County's land use regulation of Brendale's property does not threaten or have any direct, adverse effect on the political integrity, economic security, health or welfare of the Yakima Nation.

B. County zoning of fee land within an Indian reservation does not *per se* threaten or direct the tribe's political integrity, economic security, health or welfare.

The Yakima Nation adopting the Ninth Circuit Court opinion argues: Land use jurisdiction is a fundamental power of local government, necessary to protect the "health and welfare" of its citizens, and, therefor, any limitation of a tribe's exclusive reservation-wide land use jurisdiction would be a *per se* threat to the political integrity, economic security, health and welfare of the tribe.

This sweeping generalization is a completely unacceptable basis on which to determine issues in this case.

This Court has previously recognized generalizations about tribal self-government are treacherous and there are no rigid formulas to determine if application of state laws infringe upon a tribe's political integrity. See: *Mescalaro Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

The inappropriateness of the formula proposed by the Yakima Nation and Ninth Circuit to determine zoning

jurisdiction within the reservation is demonstrated by the Yakima Nation's own actions. Although the Yakima Nation asserts it has the sovereign authority to regulate land use in the incorporated towns within the reservation, it has chosen not to do so.

Respondent-Yakima Nation has offered no explanation of how differing tribal and city land use regulation, particularly along the boundaries between the cities and unincorporated areas of the reservation pose any less of a threat to the tribe's political integrity than the differing regulations of the tribe and county in other areas of the reservation. The Tribe's acceptance of zoning by cities within the reservation without finding any threat to or adverse effect on its political integrity, health or welfare precludes any argument exclusive tribal land use jurisdiction over all land within the reservation is essential to preserve tribal self-government.[7]

Montana clearly requires Respondent-Yakima Nation establish the actions of Petitioners-Brendale and Yakima County pose some specific threat to or adverse effect on the Yakima Indian Nation's political integrity, economic security, health and welfare before it may assert civil regulatory jurisdiction over Brendale's previously allotted, fee simple land. Respondent's assertion exclusive tribal jurisdiction is necessary for effective comprehensive zoning is not substantiated by the facts of this case and fails to meet the criteria of the *Montana* exception.

---

[7] The fallacy of the Ninth Circuit finding and the Yakima Nation's argument any county land use jurisdiction within the reservation threatens tribal self-government is further demonstrated by voluntary agreement pursuant to which a county zones fee land and a tribe zones trust land within the reservation. See: Amicus Brief of the Governing Council of the Pinoleville Indian Community, 10-11; 8/27/88 "Agreement" between Puyallup Indian Tribe, the United States and various local governmental agencies, Section VII, A1(a), 4 Appendix, 1a-3a.

IV. THE YAKIMA NATION'S ASSERTION OF JURISDICTION OVER THE USE OF FEE LAND WITHIN THE RESERVATION IS SUBJECT TO CONSTITUTIONAL LIMITATION.

As above-described, the Tribe's dependent status and Allotment Acts deprive the Yakima Nation of civil regulatory jurisdiction over non-members previously allotted fee land within the reservation. *Montana*, 450 U.S. at 559, n.9, 564. The Court must find there has been an "express delegation by Congress" to find the Yakima Nation has land use jurisdiction over Petitioner-Brendale's property. *Montana*, 450 U.S. at 564.

Talton v. Mayes, 163 U.S. 376, 16 S.Ct. 986 (1986), relied on by the Yakima Nation, does not, therefore, preclude application of constitutional limitations to the Tribe's actions. *Talton* precluded application of the U.S. Constitution Fifth Amendment only to the exercise of tribal powers not "created by and springing from the Constitution". 16 S.Ct. at 989. Because the jurisdiction to zone non-member fee land, if it exists, must be a delegated power, the *Talton* exemption from constitutional restrictions is inapplicable.

The extent to which an Indian tribe's exercise of delegated congressional authority over non-members is subject to constitutional limitations has not yet been decided. See: *United States v. Wheeler*, 435 U.S. at 328, n.28; *United States v. Mazurie*, 419 U.S. at 558, n.12.

Pursuant to the terms of the Yakima Nation Amended Zoning Regulations, Petitioner is prohibited from entering the reservation restricted area and obtaining any access to his property because he is not a tribal member and did not own the property in May, 1972. (JA 64, R 706) The zoning ordinance permits review of any tribal land use decisions only through an appeal to the Board of Adjustment which consists of the Tribal Council and provides for no judicial review of any zoning decisions

by the Tribal Court or otherwise. (Amended Regulations, Sections 8, 10, JA 49, 54.) If Brendale were to violate the Tribe's zoning regulations, the regulations authorize his complete exclusion from the reservation. (Amended Regulations, Sections 16, JA 56). The Yakima Nation asserts sovereign immunity prohibiting any suit against the Tribe, its officers and agents which would preclude any judicial review of tribal zoning decisions. (Amended Regulations, Section 10, JA 54, RB at 28, n.17). Brendale, although of Yakima Indian heritage, is denied membership in the Tribe because he lacks the required blood quantum and is, therefore, denied the right to vote or otherwise participate in a tribal government which claims the right to regulate the use of his fee land, to exclude him from access to his property while at the same time denying him any judicial review of tribal action.

The Tribe must, in its exercise of powers delegated by Congress, surely be held to the same constitutional standards which limit the authority of the sovereign granting it the powers, including the Fifth Amendment guarantees of due process and equal protection. *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), applying the Fifth Amendment due process and equal protection requirements of the Fifth Amendment to invalidate federal civil service regulations prohibiting employment of aliens.

It is inconceivable Congress would intend, or the Constitution would permit, citizens to be denied any participation in tribal government but be subjected to regulations which impair and limit their vested property rights particularly where all opportunity for judicial review is denied.

V. CONCLUSION

For the reasons above-described and those contained in Petitioner-Brendale's opening Brief, this Court should reverse the Court of Appeals' 9/21/87 "Opinion" and the District Court's 9/11/85 "Judgment" as requested in Petitioner's opening Brief.

Respectfully submitted,

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December 5, 1988

APPENDIX

APPENDIX

Excerpt of 8-27-88 Agreement between Puyallup Indian Tribe, the United States and various local governmental agencies

* * * *

VIII. FUTURE GOVERNMENTAL AUTHORITY, RESPONSIBILITY AND COOPERATION

In the area of governmental jurisdiction and the exercise of police powers, certainty and stability are important to the Tribe, local governments, the business sector, and private citizens, in order to achieve sustained and rational economic growth in the future, certainty for landowners, and an acceptable method of governing the area.

The restricted and trust lands of the Puyallup Indian Tribe now lie primarily within Pierce County, the City of Tacoma, and the City of Fife. The county is the second most populated county in the state and the area is highly urbanized and intensively developed. This section is intended to resolve governmental authority issues between the Tribe, United States of America, and State and local governments.

Because of the importance of these issues to both the Tribe and the other parties, these issues are extensively described below, and fully described in Document 7.

A. *Governmental Jurisdiction and Authority*

The Puyallup Indian Reservation has been historically defined in various ways; one of those is as "the land within the high water line as meandered, and the upland boundaries as shown on the Plat Map of the 1873 Survey conducted by the United States General Land Office and filed in 1874, referred to as 'the 1873 Survey Area' in this Agreement." The parties agree that this Agreement does not resolve their differences as to the current boundaries

of the Puyallup Indian Reservation. For purposes of this Agreement, the parties will use this Survey Area; a map is shown on page 27 for illustrative purposes.

The 1873 Survey Area shall not be used as basis for asserting Tribal jurisdiction or governmental authority over non-Indians, except as specifically provided by this Agreement. The federal definitions of "Indian country", "Indian lands", and/or "Indian reservation" shall not be used by the Tribe or the United States as a basis for asserting Tribal control over non-trust lands either inside or outside the 1873 Survey Area, or the activities conducted on those lands, except as provided by the Agreement, or as otherwise agreed to between the Tribe and State, and/or local governments.

"Trust land" or "land in trust status" means land or any interest in land the title to which is held in trust by the United States for an individual Indian or Tribe; "restricted land" or "land in restricted status" means land the title to which is held by an individual Indian or a Tribe and which can be alienated or encumbered by the owner only with the approval of the Secretary of the Interior, because of limitations contained in the conveyance instrument pursuant to federal law or because of a federal law directing imposing limitations. Whenever the term "trust land" is referred to in this Agreement, it shall be deemed to include both trust and restricted lands.

1. *Tribal Jurisdiction and Governmental Authority —General*

a. The jurisdiction of the Puyallup Indian Tribe shall extend to existing and future restricted and trust lands. The extent of the Tribe's jurisdiction shall be determined as provided in federal law.

b. Except as otherwise provided in this Agreement, the Tribe agrees not to assert or attempt to assert any type of jurisdiction and governmental authority, existing

or potential, including but not limited to the power to tax, as to (a) non-trust lands; (b) any activity on non-trust lands; (c) any non-Indian individual or business, on non-trust lands.

c. The settlement lands, including the Outer Hylebos parcel conveyed to the Tribe by the Terminal-3 Agreement with the Port, shall have on-reservation status; forest, recreation and cultural lands shall have off-reservation status. The reservation status of other lands shall be as provided in federal law.

d. The parties agree that all claims of ownership and governmental jurisdiction by the Tribe over the Initial Reservation or Intended Reservation on the south side of Commencement Bay will be terminated and extinguished by this Agreement.

e. The Tribe retains its authority under the Indian Child Welfare Act.

f. Notwithstanding any other provision of this Agreement, application of criminal law, family law and the Tribe's authority over its members and other Indians remains unchanged.

g. The tribe retains and nothing in this Agreement shall affect the Tribe's status as an Indian Tribal government for purposes of the Indian Governmental Tax Status Act, 26 U.S.C. § 7871, *et seq.*, including for purposes of issuing tax exempt bonds.

* * * *

4. *Jurisdiction and Governmental Authority—Other Governments*

The state and its political subdivisions will retain and exercise all jurisdiction and governmental authority over all non-trust lands and the activities conducted thereon and as provided in federal law over non-Indians.

* * * *

Nos. 87-1622, 87-1697, and 87-1711

Supreme Court, U.S.
FILED
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IN THE

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OCTOBER TERM, 1988

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STANLEY WILKINSON,
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER COUNTY OF YAKIMA

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT	2
I. YAKIMA COUNTY IS ENTITLED TO BE HEARD ON THE ISSUES *WHITESIDE I* RAISES	2
II. THE TRIBE ATTEMPTS TO RECAST THE RECORD IN ITS STATEMENT OF THE CASE	4
A. The planned development provisions of the Tribal zoning ordinance do not constitute a subdivision regulation	4
B. The level of the County's land use activity on fee lands within the open area is commensurate with its stated goal of agricultural preservation	5
C. The Tribe's characterization of county land use regulation in the closed area is inaccurate	6
III. THE EXISTENCE OF TRIBAL AND MEMBER OWNED FEE LAND WITHIN THE RESERVATION DOES NOT PREVENT THIS COURT FROM ADOPTING A "BRIGHT LINE" TEST	7
IV. A REMAND FOR A BALANCING OF COUNTY AND TRIBAL REGULATORY INTERESTS IN THE OPEN AREA IS UNNECESSARY	9
A. *New Mexico v. Mescalero Apache's* off reservation impact analysis is not applicable	10
B. The County did show off reservation impacts and the District Court has already balanced the regulatory interests of the two governments	10

TABLE OF CONTENTS—Continued

	Page
C. The Tribe misapprehends the State of Washington's land use regulatory scheme	11
V. *MONTANA* IS NOT INCONSISTENT WITH PRIOR COURT RULINGS	12
VI. CONCLUSION	14
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, et al., No. C-87-654-AAN (E.D. Wa. 1988)	7
McClanahan v. Arizona, 411 U.S. 164 (1973)	8
Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976)	8, 9
Montana v. United States, 450 U.S. 544 (1981)	*passim*
New Mexico v. Mescalero Apache, 462 U.S. 342 (1983)	10
Seymour v. Superintendent, 368 U.S. 351 (1962)	7, 8, 9
United States v. Mazurie, 419 U.S. 544 (1975)	13
United States v. Wheeler, 435 U.S. 313 (1978)	13
Washington v. Colville Tribes, 447 U.S. 134 (1980)	13
Washington v. Confederated Tribes and Bands of the Yakima Indian Nation, 439 U.S. 463 (1979)	9
White Mountain Apache v. Bracker, 448 U.S. 136 (1980)	10
Williams v. Lee, 358 U.S. 217 (1959)	13
Court Rule	
Federal Rule of Procedure 52(a)	2
Statutes	
Federal:	
General Allotment Act, 25 U.S.C. 349	8
18 U.S.C. 1151	8
18 U.S.C. 1161	13
PL 83-280 (67 Stat. 588), 22 U.S.C. 1162, 18 U.S.C. 1360	8
State:	
RCW 43.21C, State Environmental Policy Act	11
RCW 43.21C.120	12
RCW 58.17, Plats—Subdivisions—Dedications	5, 11, 12
RCW 90.58, Shoreline Management Act of 1971	11, 12
RCW 90.58.080, .090, .140	12
WAC 172-19-470	12
Other Authorities	
Settle, Washington Land Use and Environmental Practice, Sec. 2.12(c) p. 68 (1983)	4

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---

REPLY BRIEF OF PETITIONER COUNTY OF YAKIMA

ARGUMENT

I. YAKIMA COUNTY IS ENTITLED TO BE HEARD ON THE ISSUES *WHITESIDE I* RAISES.

The Tribe has made it necessary to discuss the threshold question of whether the County has standing to address the issue of the County's land use regulation of "closed area" lands. The Tribe concludes from the County's strategic choice not to appeal *Whiteside I* that the "County was apparently satisfied with Judge Quackenbush's decision . . .", and that the County should not now be heard to argue that its zoning authority can be imposed in this area under a "bright line" test. *See* RB at 15 n.11. This assertion is neither factually accurate nor legally relevant.

This assertion is flatly incorrect because the County was not ever satisfied with the District Court's decision in *Whiteside I*, and the Tribe cannot point to any part of the record where the County expressed its alleged satisfaction. Obviously, satisfaction with the result is not the only reason for not appealing a trial court decision. There were tactical, political, financial and other practical reasons for not appealing *Whiteside I*.

As the record indicates, Yakima County vigorously defended *Whiteside I*. The County carried the significant burden of discovery, briefing and presentation of evidence in that case. When confronted with the District Court's opinion, however, the County's candid assessment was that an appeal of *Whiteside I* would have little chance of success. In light of the District Court's reliance on an interpretation of *Montana* which the County shares, and the deference accorded trial court findings by Federal Rule of Civil Procedure 52(a), it appeared unlikely that the trial court's findings concerning the factual predicates for tribal jurisdiction would be overturned.

The County's decision not to appeal *Whiteside I* was a difficult one. In retrospect, it was a mistake, for the

Ninth Circuit adopted a view of *Montana* totally at odds with both the County's and the District Court's understanding. It determined that tribal jurisdiction to zone non-member fee lands in both the open and closed areas existed as a matter of law. As indicated in the County's Brief on the Merits, this reading of *Montana* causes the exception to swallow the rule and reduces that decision to a minor, aberrant opinion. It creates the danger that a significant number of Yakima County's citizens will be subject to a government in which they have no vote.

The Tribe's assertion is legally irrelevant because one of Yakima County's citizens, Philip Brendale, did preserve the closed area issue for review. Yakima County is a party to *Whiteside I* in the consolidated cases before this court just as it was below. As such, the County has the same right as any other party to advocate solutions to the problems presented by these cases. Indeed, in this instance, it has the duty to do, as it has become increasingly apparent that the rights of Yakima County citizens are at risk. Further, the April 8, 1988 ruling of the Assistant Secretary of Interior for Indian Affairs, holding the BIA's closure of roads into the closed area illegal, casts significant new light on the District Court's findings. *See Brendale Brief* at 1a-5a.

Moreover, there is no question of inconsistency that would prejudice the Tribe. The County's position is not at odds with its position below, but rather is substantively identical. The County has never maintained that it should be precluded from regulating closed area fee land or that the Tribe's interest in the closed area would not be protected by County zoning of the fee lands.[1]

---

[1] The quotation of the Yakima County Prosecuting Attorney appearing on page 30 of the Tribe's brief is in the context of the County's Rule 41(b) Motion to Dismiss made at the close of the Tribe's case in *Whiteside II*. The entire transcript of the proceedings of the trial court on that motion begins at page 350 and ends on page 410. Obviously, it is misrepresentative to single out one

II. THE TRIBE ATTEMPTS TO RECAST THE RECORD IN ITS STATEMENT OF THE CASE.

A. The planned development provisions of the Tribal zoning ordinance do not constitute a subdivision regulation.

For the first time in these proceedings, the Tribe asserts that it regulates the subdivision of land on the reservation. (RB 7). The Tribe claims to accomplish this through implementation of the planned development provisions of its zoning ordinance. (JA 65-76). The Tribe's claims are contrary to the plain terms of the ordinance and in direct contradiction of the testimony of its own witnesses.

A planned development is a regulatory technique which allows a developer of a qualifying site to be free of otherwise applicable zoning regulations (i.e., setbacks, lot sizes, and even permitted uses) in exchange for submitting to a detailed, tailored regulation, the "development plan and program". The technique is widely used as a method of allowing flexibility to the otherwise strict requirements of a Euclidian zoning scheme. The public gains precise control since development must proceed in accordance with the approved site plan. *See Settle*, Washington Land Use and Environmental Practice, Sec. 2.12(c), p. 68 (1983); *See* also the purpose section of the Tribal planned development regulation (JA 65-66).

The Tribe implements its planned development provisions through a "floating zone". That is, the planned development district is included in the text, but not the map of the zoning ordinance. The regulatory provisions of the planned development district have no application to any specific parcel until attached to that parcel by the

passage from eight days of trial held on the *Whiteside I* and *Whiteside II* cases. Further, the quotation must be read in its context—the County was therein arguing *after* the Court's decision in *Whiteside I*.

approval of a rezone application. *See* Sections 5 and 6 of the Tribal regulation (JA 68-69).

It is true, then, that a developer seeking relief from otherwise applicable provisions of the Tribal zoning ordinance might apply to have his property rezoned to planned development. However, a developer willing to comply with the zoning regulations of the applicable use district, specifically the minimum lot size, could subdivide his property without seeking a planned development rezone. Thus, the owner of 100 acres of land within the Tribe's "agricultural" use district could subdivide it into 20 five acre lots without Tribal review of any kind or the application of any development standards. Such was the testimony of Tribal Councilman Anthony Washines (WS II TR. 171-172). Interestingly, because of this, the Tribal land use expert, Keith Dearborn, was of the opinion that the procedures of the Washington Subdivision Act, RCW 58.17, should govern a proposed subdivision of fee land on the reservation. (WS II TR. 72).

B. The level of the County's land use activity on fee lands within the open area is commensurate with its stated goal of agricultural preservation.

The Tribe goes on to argue that the low level of county land use activity in the open area of the reservation somehow demonstrates the weakness of the County's arguments. The Tribe points out that the County has processed only "eight short plats per year"; "only one long plat per year", "fewer than six building permits per month"; and, that such regulatory activities constitute "only 6.4 percent of all matters worked on by the Yakima County Planning Department." (RB 8).[2]

[2] The Tribe builds a straw man when it asserts that "all petitioners boldly argue that Yakima County has "exclusive" land use regulation to the fee lands of the Yakima Indian Reservation for thirty five years." (RB 8). Yakima County's brief make no such declaration. The Tribal zoning ordinance and the history of its application to fee lands in the open area are set forth in detail at pages 17-19 of the County Brief.

What the Tribe fails to note, however, is that the purpose of the County's zoning ordinance as applied to the fee lands of the open area is the preservation of agricultural land. Most of the fee lands within the open area are zoned "exclusive agricultural", the most restrictive use district in the County zoning ordinance. This use district permits only those uses which are compatible with agriculture and has a minimum lot size of forty acres. (County BR 15). The legislative intent of the County zoning scheme in the open area is to focus development away from these prime farm lands. (County BR 7). The low level of activity is precisely the intended result.

Finally, the Tribe apparently claims that it did provide exclusive land use regulation in the 317 applications by non-members which it has processed. The Tribe notes that none of the County's "list of horribles" has occurred as a result of its regulation of this land. (RB 9). However, there is absolutely nothing in the record to indicate that these applicants did not also receive County approval of their projects. As indicated, a Tribal building permit costs only $5.00 and entails no on-site inspection. (County BR 17). What is clear, from the different numbers of applications processed by the two governments, is that most fee land owners have sought only County approval of their projects.

C. The Tribe's characterization of county land use regulation in the closed area is inaccurate.

The Tribe states that prior to the Brendale project, the County had "never" attempted to exercise land use jurisdiction in the closed area. (RB 9). This ignores the fact that the adoption of the County zoning ordinance which mapped all of the fee lands in the closed area was an exercise of land use jurisdiction. Under the Tribe's analysis, the Tribe itself never attempted to exercise land use jurisdiction in the closed area until it objected to Brendale's development. A more precise statement is that Brendale's applications were the first the County

Planning Director was aware of in the closed area. The Planning Director's testimony does indicate active state regulation of logging activity on fee lands near the shorelines in the closed area. (WS I, TR 476).

Further, the Tribe states that Brendale's proposal is "permitted" under the County zoning ordinance. (RB 9). It is important to note that the County did not approve Brendale's proposal. The last action taken by the County prior to the commencement of the Tribe's lawsuit was to require the preparation of an environmental impact statement. Indeed, the findings of fact made by the Board of Yakima County Commissioners in requiring the preparation of an EIS were adopted by the District Court in rendering its decision. (Brendale App. 50).

III. THE EXISTENCE OF TRIBAL AND MEMBER OWNED FEE LAND WITHIN THE RESERVATION DOES NOT PREVENT THIS COURT FROM ADOPTING A "BRIGHT LINE" TEST.

The Tribe alleges that it and many enrolled members own fee lands outside of the incorporated cities in both the open and closed areas of the reservation. (RB 25).[3] The Tribe argues that because of the existence of these lands, this court would be prevented from fashioning a "bright line" test based upon land tenure since: (1) The County would have no regulatory jurisdiction over fee lands owned by members pursuant to *Seymour v. Su-*

---

[3] Members of the Tribe own 67 parcels of land outside of the cities totaling approximately 1,335.68 acres. No breakdown between open and closed area ownership is available. These figures are taken from the stipulation between the County and the Tribe in the case of *Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, et. al.*, No. C-87-654-AAM. That case is currently on appeal to the Ninth Circuit, Docket No. 88-3929. This is the same stipulation referred to by the Tribe in its brief. (RB 8 n.7). The text of that portion of the stipulation concerning the extent of Tribal member fee ownership is reprinted in the appendix to this brief.

perintendent, 368 U.S. 351 (1962), and *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976); and, (2) The County could not force the Tribe to comply with its zoning ordinance because of its sovereign immunity.

First, the Tribe's point concerning its sovereign immunity is correct, but irrelevant. Lands owned in fee by the Tribe, presumably for some governmental purpose, would be treated no differently than lands within the County owned by other sovereigns, i.e., the state or federal government. The County exercises no zoning jurisdiction over such lands absent consent by the sovereign owner. This is simply a general rule of law and is no impediment to the implementation of the County zoning scheme. Indeed, two-thirds of the County's total land area is in federal ownership. (WS II TR 546).

Second, the Tribe's reliance on *Seymour* and *Moe* for the proposition that County regulation of member owned fee lands could result in an impermissible pattern of checkerboard jurisdiction is unfounded. *Seymour* did assert that this view would require police officers to "search tract books" and that such an "impractical pattern of checkerboard jurisdiction" was contrary to the language of 18 U.S.C. 1151. 368 U.S. at 357. *See also*, *Moe*, 425 U.S. at 478.[4]

However, in 1963, pursuant to federal law, the State of Washington assumed partial criminal and civil jurisdiction over Indians and reservation lands pursuant to the provisions of PL 83-280, 22 USC 1162, 18 USC 1360. The State assumed full jurisdiction over Indians on fee

[4] In *Moe*, Montana alleged that Section 6 of the General Allotment Act, 25 USC 349, gave it general authority to levy personal property and sales taxes on reservation Indians. This Court rejected that claim, noting that by its terms, Section 6 would only apply to fee lands. 425 U.S. 478. The court found that Montana's taxing authority was controlled by the same treaty terms and federal statutes discussed in *McClanahan v. Arizona*, 411 U.S. 164 (1973). 425 U.S. 480, 481.

lands but provided, with certain exceptions, that there would be no jurisdiction on trust lands absent a tribe's request. This Court upheld Washington's partial assumption of jurisdiction based upon land tenure in *Washington v. Confederated Tribes and Bands of the Yakima Indian Nations*, 439 U.S. 463 (1979). In so doing, this court cited both *Seymour* and *Moe* for the proposition that: "The lines the State has drawn may well be difficult to administer. But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction." 439 U.S. 502.

Seymour's broad assertion is, therefore, no longer controlling. Under the authority of *Washington*, an Indian owner of fee lands on the Yakima Reservation is subject to state criminal jurisdiction and state civil laws of general application in a lawsuit.

IV. A REMAND FOR A BALANCING OF COUNTY AND TRIBAL REGULATORY INTERESTS IN THE OPEN AREA IS UNNECESSARY.

The Tribe argues that if its attack on *Montana* fails, this court should affirm the Ninth Circuit's remand of *Whiteside II* for a balancing of competing County and Tribal regulatory interests. According to the Tribe, such a remand is necessary because the County allegedly failed to identify any off-reservation interest which would sustain its regulatory authority. (RB 31, 32). Such a remand is unnecessary for two reasons: (1) There is no legal authority requiring a showing of off-reservation impacts to support County regulation of non-member conduct on *fee* lands; and (2) The County did in fact, show off reservation impacts and the District Court has already balanced the regulatory interests of the two governments.

A. *New Mexico v. Mescalero Apache's* off-reservation impact analysis is not applicable.

The Ninth Circuit cited the case of *New Mexico v. Mescalero Apache*, 462 U.S. 342 (1983), as support for its conclusion that *Whiteside II* should be remanded for a balancing of County and Tribal regulatory interests and for a County showing of off-reservation impacts which would justify its zoning scheme. (County Pet. 15-A). The Ninth Circuit's reliance on *Mescalero* is misplaced. That case dealt with a state's attempt to regulate non-member hunting and fishing on reservation *trust lands* in the face of pervasive and explicit federal regulation of the same conduct. The distinction between fee lands and trust lands was not lost upon this Court in *Mescalero*:

> "Our decision in *Montana v. United States, supra,* does not resolve this question. Unlike this case, *Montana* concerned lands located within the reservation, but *not* owned by the Tribe or its members. We held that the Crow Tribe could not as a general matter regulate hunting and fishing on those lands. (citations omitted) But as to 'land belonging to the Tribe or held by the United States in trust for the Tribe, we readily agree(d) that a Tribe may prohibit nonmembers from hunting or fishing . . . (or) condition their entry by charging a fee or establish bag and creel limits.' 462 U.S. 330, 331 (1983) (emphasis in the original).

See also, *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980) (dealing with non-member conduct on federally regulated trust lands). Indeed, in *Montana*, this court required no showing of off-reservation impacts to sustain state regulation of non-member hunting and fishing on reservation fee lands.

B. The County did show off-reservation impacts and the District Court has already balanced the regulatory interests of the two governments.

The Tribe and its amici assert that the County failed to demonstrate any off reservation impact which would

justify its regulation of open area fee lands. This is simply incorrect. There is strong evidence in the record concerning the importance of reservation fee lands to Yakima County's agricultural economy. See TR 416, 423; ex. 244; County BR 9-11. Preservation of agricultural land is the cornerstone of the County's zoning scheme as applied to the open area; it is necessary to preserve the County's overall health and welfare. The District Court found that Yakima County's open area zoning is "expressly designed to protect the County's agricultural land and other resources." County Pet. 30-A.

Finally, because the District Court found that the Tribe presented "no evidence whatsoever that could support the Tribe's assertion that county regulatory authority interfered with its political integrity, economic security, or health or welfare," there is simply no need for further balancing. County Pet. 51-A.

C. The Tribe misapprehends the State of Washington's land use regulatory scheme.

The Tribe asserts that various state land use laws which might be applicable to non-member owned fee land are not at issue in *Whiteside II*, specifically: Plats, Subdivisions, Dedications, RCW 58.17; Shoreline Management Act of 1971; RCW 90.58; and the State Environmental Policy Act, RCW 43.21C (RB 34). The Tribe concludes that the State's regulatory interest would have to be shown by off-reservation effects "as *could be done* for these legislative enactments". (RB 34). (emphasis added). The Tribe's admission that off-reservation impacts can be shown for these legislative enactments is particularly interesting since both *Whiteside I* and *II* arose in the context of the County's administration and implementation of the State Subdivision Law, RCW 58.17 and the State Environmental Policy Act, RCW 43.21C.

Moreover, the Tribe's assertion is a misapprehension of Washington State's regulatory scheme. The statutes

are enabling acts, and have no effect absent implementation by the County.

For example, pursuant to RCW 58.17 the County is required to regulate the subdivision of land within its boundaries. The adoption of development standards and local procedures is done by county ordinance.

The Shorelines Management Act provides for shared state and local responsibility. The County is required by its terms to adopt and administer a Master Program governing shoreline development which must be approved by the State Department of Ecology. RCW 90.58.080, .090. All shoreline permits issued by the County are reviewed by the Department of Ecology, and in the case of variances and conditional uses, must also be approved by that agency. RCW 90.58.140.[5]

Likewise, the County is bound by the State Environmental Policy Act to adopt and administer a local ordinance implementing the statute's guidelines. RCW 43.21C.120.

The state policies contained in these laws are all implemented at the county level. If the County has no regulatory authority on the reservation then, necessarily, these laws will have no application there.

V. *MONTANA* IS NOT INCONSISTENT WITH PRIOR COURT RULINGS.

The Tribe attacks this Court's ruling in *Montana* as "unprecedented" and urges that what it terms the

[5] The Tribe asserts that the State Department of Ecology has recognized that the Shorelines Management Act does not apply to the reservation. (RB 34 n.19). Such is not the case. By its terms, the Yakima County Shorelines Master Program does apply to all shorelines of Ahtanum Creek and the Yakima River, including reservation lands. [Ex 214, p. 78, 83-4]. The County Master Program was approved by the Department of Ecology and is a chapter of the Washington Administrative Code, WAC 172-19-470. As indicated by the record, the County has issued permits for reservation fee lands. [WS II Tr. 496].

"Mazurie-Wheeler-Colville" view of tribal sovereignty should be adopted. This Court's decision in *Montana* is not inconsistent with any of these cases.

Washington v. Colville Tribes, 447 U.S. 134 (1980), held that the "power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 477 U.S. 152. The *Colville* case is inapposite to the cases at bar. None of the parties before this court challenge the Tribe's ability to regulate trust lands or transactions occurring on those lands.

The Tribe's assertion that the case of *United States v. Wheeler*, 435 U.S. 313 (1978) is somehow inconsistent with this Court's holding in *Montana* is puzzling. The *Montana* court relied on *Wheeler* in its discussion of the concept of inherent tribal sovereignty. 450 U.S. 563-564. *Wheeler* is cited for the proposition that there has been an implicit divestiture of inherent sovereignty in those areas involving relations between the Tribe and non-members. 450 U.S. 564. The "*Wheeler*" test and the "*Montana*" test are identical.

U.S. v. *Mazurie*, 419 U.S. 544 (1975), involved Tribal regulation of a non-Indian owned bar doing business with Indians on the reservation. Such regulation was explicitly authorized by Congress pursuant to 18 U.S.C. 1161 since the bar was not located in a "non-Indian community". 419 U.S. 553. The Court cited *Williams v. Lee*, 358 U.S. 217 (1959), in holding that the bar owner's inability to participate in tribal government did not preclude the regulation since the regulated conduct occurred on the reservation and involved transactions with Indians. 419 U.S. 558. *Montana*, also citing *Williams v. Lee*, specifically recognized this type of consensual relationship as subject to tribal jurisdiction. 450 U.S. 565.

VI. CONCLUSION

For the foregoing reasons, and those the County has previously briefed to this Court, this Court should grant the relief requested by the County in its opening brief.

Respectfully submitted on December 5, 1988.

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-654-AAM

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION,
Plaintiff,

vs.

COUNTY OF YAKIMA; and DALE A. GRAY, Yakima County Treasurer,
Defendants.

* * * *

LANDS, POPULATION AND OWNERSHIP

* * * *

3. The Yakima Indian Nation has 7,604 enrolled members. Approximately 4,500 of these members reside within the boundaries of the Yakima Reservation. Approximately 104 individual members of the Yakima Nation are known to own a total of the 139 parcels of fee-patented land within the Yakima Indian Reservation. Of these 139 parcels, 72 are residential lots whose acreages are not known to the parties. Of these residential lots, 33 are in Toppenish, 17 in Wapato, 14 in White Swan. The remaining 67 parcels comprise a total of 1,335.68 acres, and their total assessed value is $4,580.420.

* * * *

DATED this 25th day of April, 1988.

/s/ _____

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NOS. 87-1622, 87-1697, and 87-1711

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF
THE YAKIMA INDIAN NATION, ET AL.,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF
THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, ET AL.,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS OF
THE YAKIMA INDIAN NATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

86 PP

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QUESTIONS PRESENTED

I

WHETHER, CONSISTENT WITH THE 1834 STATUTE DEFINING INDIAN COUNTRY TO EXCLUDE NON-INDIAN LANDS, THE GENERAL ALLOTMENT ACT, THE INDIAN REORGANIZATION ACT, AND INDIAN LAW AND TREATY, INDIAN TRIBES HAVE BEEN HISTORICALLY REGARDED AS HAVING GENERAL CIVIL JURISDICTION OVER NON-INDIANS AND THEIR LANDS ON INDIAN RESERVATIONS.

II

WHETHER THE UNITED STATES CONSTITUTION AS INTERPRETED IN BOOS V. BERRY AND OTHER CASES, PERMITS CONGRESS, WHEN ACTING ALONE OR WITH AN INDIAN TRIBE, TO DEPRIVE NON-INDIAN CITIZENS OF THEIR RIGHT TO GOVERN THEMSELVES.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	2
SUMMARY OF THE ARGUMENT	12
ARGUMENT	15
I. INDIAN TRIBES HAVE NEVER BEEN RECOGNIZED TO HAVE GENERAL CIVIL JURISDICTION OVER NON-INDIANS, AT LEAST ON FEE LANDS.	15
II. THE UNITED STATES CONSTITUTION DOES NOT ALLOW THE CONGRESS, EITHER ACTING ALONE OR JOINTLY WITH AN INDIAN TRIBE, TO DEPRIVE NON-INDIANS OF THEIR RIGHT TO GOVERN THEMSELVES.	48
CONCLUSION	63
APPENDIX	A-1

TABLE OF AUTHORITIES

CASES:	PAGE
Alberty v. United States, 162 U.S. 499, 502-503 (1896)	25
Baker v. Carr, 369 U.S. 186 (1962)	32
Bates v. Clark, 95 U.S. 204, 208 (1877)	13, 21, 23, 28, 38, 49
Boos v. Berry, ____ U.S. ____, 99 L.Ed.2d 333, 346 (1988)	14, 58
Buster v. Wright, 135 F. 947 (8th Cir. 1905)	37, 38
California v. Cabazon Band of Indians, 480 U.S. ____, 94 L.Ed.2d 244, 259, n.19 (1987)	52
Cherokee Nation, The v. Georgia, 5 Pet. 1, 8 L.Ed. 25 (1831)	16
DeCoteau v. District County Court, 420 U.S. 425, 432 (1975)	2, 24
De Geofroy v. Riggs, 133 U.S. 258, 267 (1889)	57, 58
Duncan v. McCall, 139 U.S. 449, 461 (1891)	60
Examining Board of Engineers v. Flores De Otero, 426 U.S. 572, 600 (1976)	56

	PAGE
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. ____, 96 L.Ed.2d 250 (1987)	31, 32
Fisher v. Dist. County Court, 424 U.S. 382, 383 (1976)	39, 40, 45
Fletcher v. Peck, 6 Cranch 87, 147, 3 L.Ed. 162, 181 (1810)	16, 30, 35
Fuentes v. Shevin, 407 U.S. 67 (1972)	32, 47
Goldberg v. Kelly, 397 U.S. 254 (1970)	47
Greywater v. Joshua, 846 F.2d 468, 493 (8th Cir. 1988)	63, 64
In Re Crow Dog, 109 U.S. 556, 569 (1883)	30
Iowa Mutual Insurance Company v. LaPlante, 480 U.S. _____, 94 L.Ed.2d 10 (1987)	44, 45, 46, 48, 52
Kinsella v. U.S., 361 U.S. 235 (1960)	56
Local 28 of the Sheet Metal Workers International Assn. v. EEOC, 478 U.S. _____, 88 L.Ed.2d 47 (1986)	4
Mattz v. Arnett, 412 U.S. 481, 496 (1973)	24
McClanahan v. Arizona State Tax Comm., 411 U.S. 164, 172 (1973)	52

	PAGE
Montana v. United States, 450 U.S. 544 (1981)	13, 22, 23, 26, 30, 34, 35, 36, 37, 38, 30, 40, 42, 43, 44, 45, 46, 48, 49, 62
Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906)	41
National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. 845 (1985)	44
Nevada v. Hall, 440 U.S. 410, 426 (1979)	60
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)	52
Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987), cert. denied _____ U.S. _____ (1987)	24
Northern Pipeline Construction Company v. Marathon Pipeline Company, 458 U.S. 50, 67, n.17 (1982)	56
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978)	15, 18, 20, 31, 32, 34, 35, 36, 43, 62
Reid v. Covert, 354 U.S. 1, 5-6 (1957)	56, 57, 58
Santa Clara Pueblo v. Martinez, 436 U.S. 49, 82 (White, J., dissenting)	11

	PAGE
Seymour v. Superintendent, 368 U.S. 351, 358 (1962)	29
Solem v. Bartlett, 465 U.S. 463, 468 (1984)	13, 27, 28, 29
Thomas v. Gay, 169 U.S. 264 (1898)	42
Tinker v. Des Moines School District, 393 U.S. 503 (1969)	47
United States v. Celestine, 215 U.S. 278 (1909)	30
United States v. Payne, 264 U.S. 446, 448 (1924)	17
United States v. Wheeler, 435 U.S. 313, 323 (1978)	33, 34, 36, 43, 62
Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-154 (1980)	36, 45, 46
Williams v. Lee, 358 U.S. 217 (1959)	36, 40, 41
Worcester v. Georgia, 6 Pet. 515, 551-552, 554, 8 L.Ed. 483 (1882)	17, 18
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	4
OTHER REFERENCES:	
Act of June 30, 1834, 4 Stat. 729	13, 21
Act of April 29, 1868, 15 Stat. 635	18, 19

	PAGE
Act of March 11, 1889, 25 Stat. 783, § 6	25
Act of May 2, 1890, § 31, 26 Stat. 81, 93	25
Dawes Act	15
General Allotment Act	15, 22, 23, 26, 28, 35
Indian Civil Rights Act	8, 9
Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq.	50
Indian Reorganization Act of 1934, 48 Stat. 984	26
Indian Self Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 et seq.	50
18 U.S.C. § 1151 (1948)	13, 29, 30, 49, 52, 61
18 U.S.C. § 1165	3
25 U.S.C. § 331, 345, 352(a) and (b)	24
Bill of Rights	58, 59
Brakel, American Indian Tribal Courts, The Costs of Separate Justice (American Bar Foundation 1978)	11
Cohen, Handbook on Federal Indian Law, 359 (1942)	28

	PAGE
Declaration of Independence, July 4, 1776	59
Executive Office of the President, "Budget of the United States Government, Fiscal Year 1989," p. 5-87, 5-88	51
Federalist No. 39	59, 60
Hearings Before the United States Commission on Civil Rights, Rapid City, South Dakota, 1986	5, 6, 8, 9, 10
Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 89th Cong., 1st Sess. (1961, 1965)	11
Otis, The Dawes Act and the Allotment of Indian Lands (F. Pucha Ed.)	24
S.D. Const.	11, 12, 14, 58, 59

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BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

South Dakota comes before this Court seeking to preserve the right of its non-Indian citizens on fee lands to continue to govern themselves.

Indian tribes in South Dakota have recently and frenetically attempted to effect a revolution in the governance of non-Indians. For example, the Indian tribe in Sisseton, South Dakota, has recently claimed the right to regulate non-Indian fishing on all non-navigable lakes in the area, even though some of the lakes are surrounded 100 percent by non-Indians and even though the Sisseton Reservation has been disestablished. See DeCoteau v. District County Court, 420 U.S. 425 (1975).

The Indian tribe of the Pine Ridge Reservation has attempted to coerce the State of South Dakota into recognition of tribal

license plates even outside the borders of the reservation.

The Indian tribe at the Cheyenne River Sioux Tribe has attempted to force the community of Isabel, a town of over 80 percent non-Indians, into buying a tribal liquor license, in direct defiance of the federal liquor law. See 18 U.S.C. § 1165. The tribe has also retaliated for the failure of the reservation communities to buy such licenses by imposing a tribal boycott of such towns in which such businesses are located.

Several tribes, including the Oglala Sioux Tribe of Pine Ridge, the Rosebud Sioux Tribe, the Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe have enacted Tribal Employment Rights Ordinances. See, e.g., excerpts from Oglala Sioux Tribe Ordinance No. 84-08, set out in the Appendix. These ordinances purport to impose a requirement that a contractor or employer working in the

reservation, including one on fee lands, hire any Indian over any non-Indian. The ordinances most certainly violate the equal protection clause. See Local 28 of the Sheet Metal Workers International Assn. v. EEOC, 478 U.S. _____, 88 L.Ed.2d 47 (1986); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). The ordinances also contain provisions which may violate search and seizure law, set up elaborate administrative machinery for the enforcement of the ordinances, and then impose a tax on the mostly non-Indian businesses to pay for the ordinances.

Non-Indians were not, of course, allowed to vote for or against the enactment of any of the ordinances or policies established by the tribes as mentioned above. Nor can they sit on a tribal jury to determine the violation of such an ordinance.

If non-Indians are to be abruptly, in 1988, subjected to tribal governance, they have the right, as a matter of at least natural law, if not federal constitutional law, to a government which is of a high character and caliber. Moreover, because the non-Indian citizenry has no opportunity to participate in policy making, the non-Indian citizen should at least be able to expect a highly competent and independent judiciary.

Yet the experience in South Dakota is plainly to the contrary. The recent hearings before the United States Commission on Civil Rights yield graphic examples. See Hearings Before the United States Commission on Civil Rights, Rapid City, South Dakota, 1986. The Hearings, taken under oath, were teaming with evidence of lawlessness. Four tribal judges reported that they were suspended or fired as a direct result of decisions made by them. These include Rosebud Sioux Tribal Judge

Trudell Guerue (suspended), Hearings, p. 121; Cheyenne River Sioux Tribe Judge Nancy Condon (suspended), id. at p. 369, Judge Gilbert LaBeau (fired), id. 139, 149; and Judge Woods (fired), id. at 393. The chairman of the Cheyenne River Sioux Tribe testified under oath that tribal law has been "amended by the tribal council that no reason is needed now to remove a judge. All it takes is just an action of the tribal council to remove a judge." Id. at 383.

Perhaps even more ominous was the readiness of the tribal councils to overrule the decisions of the tribal courts. The hearings reveal this is a regular occurrence. See Hearings, p. 130, see also Hearings, pp. 37, 75. But see, Hearings, p. 74. The tribal councils are said to be "very receptive" to requests to achieve a remedy which a party had failed to achieve in court. Hearings, p.38. The ability of tribal

councils to take such actions would not be so disturbing, of course, in a situation in which the non-Indians were able to vote for members of the tribal council. If, however, powers of tribal governments are unleashed to dictate the affairs of non-Indians on fee land on the reservation, it can be almost certainly predicted that non-Indians who manage to achieve justice in the tribal courts will be faced with further obstacles to the achievement of that justice in the tribal councils. Since they have no representation in the tribal councils[1] and since the rule of law is not even theoretically applicable therein, the

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[1]Indeed, the Bylaws of the Cheyenne River Sioux Tribe extend the right to attend the tribal council meetings only to "members of the Tribe." Bylaws of the Cheyenne River Sioux Tribe of South Dakota, Art. IV, § 6.

non-Indians can be said to have been deprived of their most basic rights.

It is also important to stress that the tribal councils profess to have the ability to negate not only ordinary law but also federal law, including the Indian Civil Rights Act itself. On many reservations, the Indian Civil Rights Act is a dead letter. On the Cheyenne River Sioux Tribe Reservation, the tribal judge regularly refers any Indian Civil Rights Act action to the tribal council to determine whether it will waive sovereign immunity. Hearings, p. 356, 379. In no case since 1979 has the tribal council waived such immunity. Hearings, p. 377. A former judge at Rosebud has said of the Indian Civil Rights Act, "The Indian Civil Rights Act--this may not be nice to say, but you get more use out of a roll of toilet paper. That is nothing. It means nothing." Hearings, p. 125-126.

Professor Pomershein, a pro-tribal government advocate, testified on the effect that the assertion of sovereign immunity had on the Indian Civil Rights Act in tribal court: "I think that for all practical purpose that puts an end to it" with the exception of the habeas corpus relief. Hearings, p. 17.

A glance through the hearing record reveals other serious generic difficulties--300 people arrested in a four to five month period who never came to court, Hearings, p. 124, tribal judges who pre-sign stacks of search warrants and arrest warrants, Hearings, pp. 98-99; a prosecutor fired eight times by the tribal council, Hearings, p. 345; and the common practice of litigants to obtain a new judge and a new order when they do not like the old judge and the old order, Hearings, pp. 36, 63. Especially telling with regard to appellate

court judgments was the comment of Krista Clark, an attorney with Dakota Plains Legal Services:

> I have had experience with the appellate court issuing decisions directly to lower court judges, and the lower court judges, probably because they didn't understand what they were supposed to do, completely ignoring what the appellate court said for them to do, and repeating the same exact same errors.
>
> I don't think that precedent means anything.

Hearings, p. 72.

The situation in tribal government and tribal courts in South Dakota is serious. Hearings elsewhere, we are informed, reveal the same problems in other places. Letter dated January 26, 1988, from John R. Bolton, Assistant Attorney General, U.S. Department of Justice, to Senator Daniel K. Inouye, included as Appendix B to Brief of States of Arizona, et al. in Support of Petitions for a Writ of Certiorari to the United States Court

of Appeals for the Ninth Circuit in this litigation. Nor are these new problems, as revealed by the hearings on the Civil Rights Act in the late 60's. See Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 89th Cong., 1st Sess. (1961, 1965). See also Brakel, American Indian Tribal Courts, The Costs of Separate Justice (American Bar Foundation 1978). The work by Brakel, a research attorney for the American Bar Foundation, is especially illuminating in that it, when read with the transcript of the recent hearings, reveals the persistence, and indeed the worsening of problems within the tribal judicial systems. See also, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 82 (1978) (White, J., dissenting).

The South Dakota Constitution adopted in 1889, pronounces the people of South Dakota grateful for their "civil and religious

liberties," and sets forth the purposes of the Constitution to form a "more perfect and independent government, establish justice, [and] ensure tranquility . . . ." Preamble, S.D. Const. Preservation of the right of non-Indians on fee lands to continue to rule themselves will serve that end. Subjection of non-Indians to the governance of the tribes will run counter to that end. For these reasons the State of South Dakota requests this Court to overturn the decisions of the Court of Appeals.[2]

SUMMARY OF ARGUMENT

South Dakota's argument is in two parts. First, South Dakota argues that the commonly

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[2] See Reviser's Note, 1948 Act, 18 U.S.C. § 1153 for a brief overview of some of the complex jurisdictional history of the state of South Dakota.

shared assumption of the executive, legislative, and judicial branches was that the tribes were not to have jurisdiction over non-Indians and especially non-Indians on fee lands. Indeed, the historical concept of "Indian country" did not, in general, even include non-Indian lands on reservations. See 4 Stat. 729, Act of June 30, 1834; Bates v. Clark, 95 U.S. 204, 208 (1877). It was not until the passage of 18 U.S.C § 1151 in 1948 that Congress declared fee lands to be "Indian country." See, Solem v. Bartlett, 465 U.S. 463, 468 (1984). Moreover, because the lands at issue were apparently conveyed under the authority of the Allotment Acts, the rule of Montana v. United States, 450 U.S. 544, 559, n.9 (1981) precluding tribal jurisdiction over non-Indians who took the allotments is applicable.

South Dakota next submits that a change (or affirmation) in federal policy to permit

the tribes to have civil jurisdiction over non-Indians, and especially those on fee lands, is constitutionally impermissible. The reason is a basic one. Non-Indians are excluded from participation in tribal government. To impose tribal jurisdiction on a non-Indian deprives him of his most basic rights under the Constitution. Since Congress cannot, even under the treaty power, deprive any of its citizens of their rights under the Constitution, see Boos v. Barry, ____ v. ____, 99 L.Ed.2d 333, 346 (1988), it cannot deprive the non-Indians on the plains of South Dakota of their right to representative government any more than it could deprive blacks in the city of Selma, Alabama of their right to representative government.

ARGUMENT

I

INDIAN TRIBES HAVE NEVER BEEN RECOGNIZED TO HAVE GENERAL CIVIL JURISDICTION OVER NON-INDIANS, AT LEAST ON FEE LANDS.

In determining whether Indians are now, or have been at any time, assumed to have civil jurisdiction over non-Indians, it is useful to examine the periods before, during and after the General Allotment Act or Dawes Act. Each of these periods, in the opinion of the State, yields the conclusion that the common understanding was that tribal civil jurisdiction did not extend to non-Indians, especially those non-Indians beyond the limits of the lands owned by the tribe or held in trust by the tribe. The common understanding or presumption of the executive, judicial and legislative branch is, of course, significant. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

A. Pre-General Allotment Act Era.

From the very first, this Court has indicated that the tribal governments retained a right to govern only tribal members and that this right extended only to tribally owned and occupied lands. In Fletcher v. Peck, 6 Cranch 87, 147, 3 L.Ed. 162 (1810), Justice Johnson stated:

> All of the restrictions upon the right of soil and the Indians, amount only to an exclusion of all competitors from their markets; and a limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. (Emphasis added.)

Justice Marshall pronounces the Indians to be domestic dependent nations in The Cherokee Nation v. Georgia, 5 Pet. 1, 8 L.Ed. 25 (1831). Critically, he goes on to say:

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the

> United States resembles that of a ward to his guardian.

8 L.Ed. at 31. The Indians are wards of the United States; when they give up their property the United States gains title. What occurs at that moment? The Plaintiffs in the case now before this Court argue that at this moment the tribe becomes the ruler of non-Indians on the property which they have ceded. Clearly the opposite is implied. Congress could not have intended the ward to become the guardian when his right to particular territory ceased. See also, United States v. Payne, 264 U.S. 446, 448 (1924).

In Worcester v. Georgia, 6 Pet. 515, 551-552, 554, 8 L.Ed. 483 (1882) Chief Justice Marshall examined the tribal acknowledgement of dependence upon the United States as embodied in treaty and stated:

> The Indian nations were, from their situation, necessarily dependent on

> [the United States] . . . for their protection from lawless and injurious intrusions into their country.

Id. at 555, 8 L.Ed. 483. According to the Oliphant Court, 435 U.S. at 207, this acknowledgement implied "in all probability" that the tribe recognized that the United States would arrest and try non-Indian intruders who came into their reservation.

The dependence of the tribe on the United States for criminal jurisdiction purposes was thus made apparent by the treaty itself.

A similar statement of dependence, a statement which clearly is a dependence as to wrongs done to property, is included in the 1868 Treaty with the Sioux. This treaty is of special interest to the State of South Dakota since it involves South Dakota tribes, among others. The Treaty with the Sioux at Art. I states:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

15 Stat. 635, Act of April 29, 1868 (emphasis added).

Thus the section requires the Indians to turn over a white person who has committed a wrong, or tort, against the "person or property of the Indians" to the federal authorities who will "reimburse the injured person for the loss sustained."

This is the essence of a civil recovery. The Indians were not allowed civil jurisdiction over the non-Indians; they were to turn the person who injured an Indian or damaged property over to the federal

authorities who would then take care of the matter. Thus the situation in South Dakota goes further than in Oliphant in that the precise actions of the United States are described in the treaty itself. Tribes subject to the 1868 Treaty, therefore, cannot been recognized as having general civil jurisdiction over non-Indians through treaty--the contrary is clearly the case.

In determining the reach of tribal jurisdiction, it is also important to note the development of statutory law. In 1834 the Congress enacted "An Act to Regulate Trade and Intercourse with Indian Tribes and to Preserve Peace on the Frontiers." The Act defines "Indian country" as follows:

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the

> purposes of this act, be taken and deemed to be the Indian country.

4 Stat. 729, Act of June 30, 1834. The Act thus recognizes as Indian country only that land to which the Indian title had not been extinguished. Where Indian title was extinguished, there was no Indian country.

Moreover, this Act was found, in 1877, to be applicable to all lands, whether east or west of the Mississippi, clearing up any potential ambiguity in the statute.

> The simple criterion is, that, as to all the lands thus described, it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further Act of Congress, unless by the Treaty by which the Indians parted with their title, or by some Act of Congress, a different rule was made applicable to the case.

Bates v. Clark, 95 U.S. 204, 208 (1877) (emphasis added). Thus, leading into the

period of the General Allotment Act, both common law and the statutory law indicated that in general a tribe's jurisdiction ceased where its land ownership ceased.

B. The General Allotment Act Era.

The reason this case comes before this Court is that non-Indians reside on the reservation. The reason non-Indians reside on the reservation is that Congress enacted the General Allotment Act establishing the federal policy to invite non-Indians to the reservations. The issue, therefore, is whether Congress intended the non-Indians who took advantage of the General Allotment Act to be subject to tribal jurisdiction.

This Court definitively identified the purpose and effect of the General Allotment Act in Montana v. United States, 450 U.S. 544 (1981). The opinion points out that the "policy of the Acts was the eventual assimilation of the Indian population" and

the elimination of "tribal relations." 450 U.S. at 559, n.9. Consistent with the "Act to Regulate Trade and Intercourse with Indian Tribes" passed in 1834, see Bates v. Clark, supra, Congress intended in passing the General Allotment Act that diminishment of territory of the tribe would necessarily preclude the exercise of jurisdiction by the tribe as to that territory and to the persons taking allotments. According to the Court:

> Indeed, throughout the congressional debates, allotment of Indian lands was consistently equated with the diminishment of tribal affairs and jurisdiction [citing several senatorial speeches].

450 U.S. at 559, n.9. The Court went on to say:

> It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Id.

See also, DeCoteau v. Dist. County Court, 420 U.S. 425, 432 (1975); Mattz v. Arnett, 412 U.S. 481, 496 (1973); Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987), cert. denied _____ U.S. _____, (1987) (construing several allotment statutes including 25 U.S.C. § 331, 345, 352(a) and (b)). See also, Otis, The Dawes Act and the Allotment of Indian Lands (F. Pucha Ed.).

In line with this view are the congressional enactments establishing a United States court "in Indian territory." The first act, in 1889, provided general jurisdiction and civil actions would lie in United States court. The important proviso is

> Nothing herein contained shall be construed to give the [United States] court jurisdiction over controversies between persons of Indian blood only. . . .

25 Stat. 783, § 6, Act of March 11, 1889. Thus, the tribal court by implication had no jurisdiction to hear actions involving non-Indians. It could hear "controversies between persons of Indian blood only."

Similarly, the following year, the Act was amended but the jurisdiction of the tribes was again identified. Section 31 states that the

> Judicial tribunal of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in Indian country in which members of the nation by nativity or adoption shall be the only parties.

Act of May 2, 1890, § 31, 26 Stat. 81, 93. See Alberty v. United States, 162 U.S. 499, 502-503 (1896), pointing out that the Congress in this Act limited the jurisdiction of the tribal court beyond that of the 1868 Treaty with the Cherokee.

In other words, the Congress in these Acts refused to recognize any civil

jurisdiction in Indian country with regard to non-Indians, even non-Indians on Indian lands. Such a Congress would not, it seems reasonable to say, vest civil jurisdiction over non-Indians in a place not thought to be Indian country. Thus, the Congresses which enacted the Allotment Acts could not have intended that the tribes have jurisdiction in civil matters over non-Indians on the newly allotted lands. Such is completely inconsistent with the interpretation of the General Allotment Act in Montana v. United States and of the contemporaneous legislation cited above.

C. The Post General Allotment Act Era.

One of the principal landmarks of the post General Allotment Act era is the Indian Reorganization Act of 1934. 48 Stat. 984. The amicus brief on the merits submitted by the State of Washington thoroughly demolishes the myth that the Indian Reorganization Act

recognized tribal jurisdiction over non-Indians. Exactly the contrary is true, as Washington so ably establishes. A proper reading of the IRA strongly supports the thesis that the tribes were not intended to have jurisdiction over non-Indians.

Moreover, the post General Allotment Act era was marked by a continued recognition of the nexus between ownership of lands by Indians and reservation status. In Solem v. Bartlett, 465 U.S. 463, 468 (1984) the Court explained:

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and to a more limited degree, open lands that had not yet been claimed by non-Indians. [Citations omitted.] Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily defined Indian country to include lands held in fee by

non-Indians within reservation boundaries.

Thus, at least until 1948, fee lands within the boundaries of a reservation were not regarded as "Indian land." See also, Cohen, Handbook on Federal Indian Law, 359 (1942). The reservation was not regarded to be coextensive with its external boundaries. For these reasons alone, the non-Indian on fee land remains today beyond the jurisdiction of the tribe. This is so because the United States granted the property in question to non-Indians before 1948,[3] and must have intended, consistent with the line of cases from Bates through Solem v. Bartlett and consistent with the policy of the General Allotment Act, that the

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[3]The Indian Reorganization Act of 1934 halted further disposition of tribal territory.

non-Indians would not then be in Indian country and hence certainly not subject to Indian jurisdiction.

A critical distinction must be made at this juncture. It is now established that fee lands on the reservation are, by virtue of the Act of 1948, "Indian country." See Solem v. Bartlett, 465 U.S. at 468.

Nonetheless, the intention of the Congress with regard to civil jurisdiction over non-Indians on fee patented lands must be separately considered. Seymour v. Superintendent, 368 U.S. 351, 358 (1962) points out that the reason for passage of 18 U.S.C. § 1151 in 1948 was the avoidance of checkerboard jurisdiction in criminal matters. See also, Reviser's Note, 1948 Act. No reasonable argument can be made that the 1948 Act extended tribal civil jurisdiction over non-Indians when the Act was, in fact, intended to set the parameters of federal

criminal jurisdiction over Indians. While the technical legal status of fee lands may be reservation by virtue of the 1948 Act, and while the tribes may therefore have jurisdiction over their own members on those particular lands by virtue of this Act, cf., United States v. Celestine, 215 U.S. 278 (1909) the intent of Congress with regard to non-Indians on fee lands within the reservation remained that they were beyond tribal civil jurisdiction, consistent with the Court's decision in Montana v. United States.

Recent Cases

The inability of a tribe to control any affairs but their own, see Fletcher v. Peck, 6 Cranch 87, 147, 3 L.Ed. 162, 181 (1809); In Re Crow Dog, 109 U.S. 556, 569 (1883) and the statutory and common law limitations of tribal authority to their own land and members set the stage for the most important

recent Indian cases. In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), this Court found that the Indian tribes were prohibited from exercising powers which were inconsistent with their status. The Court said:

> from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States by unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty.

435 U.S. at 210. The tribes now, in effect, contend that a non-Indian may be deprived of rights in his property by tribal courts and deprived of his right to govern himself by tribal governments even though these rights, enforceable in civil court, are of constitutional dimension. Zoning, of course, the issue in this very case, can effect a constitutional taking, see First English

Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. ____, 96 L.Ed.2d 250 (1987). Likewise, the government may act unconstitutionally to deprive a debtor of his property. Fuentes v. Shevin, 407 U.S. 67 (1972). The very right to one-person one-vote is enforceable by civil action. Baker v. Carr, 369 U.S. 186 (1962). Certainly invasion of these rights constitutes unwarranted intrusion into personal liberty condemned in Oliphant.

The Oliphant Court also pointed to the "commonly shared presumption of Congress, the executive branch, and the lower federal courts that the tribal courts do not have the power to try non-Indians. . . ." 435 U.S. at 406.

It should be noted, again, that the commonly shared presumption was that Indian tribes did not have jurisdiction outside of their own territory and that their territory

ended where their property ended. Thus the commonly shared presumption was that a non-Indian on fee land would not be subject to the jurisdiction of the tribal courts if, for no other reason, than that those fee lands were outside of what was regarded as Indian country or the Indian reservation.

In United States v. Wheeler, 435 U.S. 313, 323, the Court again referred to the fact that tribal jurisdiction was limited "by implication as a necessary result of their dependent status." 435 U.S. at 323. Of note is the specific recognition of what the Court believed the inherent tribal sovereignty of the tribe to be. The Court referred to the right to determine the "membership" in the tribe, "to regulate domestic relations among tribe members" and also "to prescribe rules for the inheritance of property." 435 U.S. at 322, n.18. While this list may not have been intended to be exclusive, the citation

of the six cases in the footnote, and the identification of specific sorts of powers, leads quite quickly to the conclusion that the Court did not assume that the tribe had broad powers over non-Indians. When the Court identified the constituents of inherent sovereignty in Wheeler, it certainly did not, by any stretch of the imagination, imply that the tribes had a broad authority over non-Indians. Indeed, the opposite is very strongly implied.

Montana v. United States, 450 U.S. 544 (1981) builds upon Oliphant and Wheeler.

Montana's holding is based on two related principles. First, Montana finds that Congress did not intend non-Indians who took property under the General Allotment Act to be subject to tribal jurisdiction. 450 U.S. at 559, n.9. As discussed above, the Court found that such would defy "common sense."

Second, the Court re-echoed the words of Justice Johnson in Fletcher v. Peck to the effect that the Indians had lost any "right of governing every person within their limits except themselves." Fletcher v. Peck, 6 Cranch 87, 147, 3 L.Ed. 162, quoted in Montana v. United States, 450 U.S. at 565. According to the Montana Court, 450 U.S. at 464, the principles on which Oliphant, supra relied

> support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. (Emphasis added.)

The Court went on to apply the two principles--i.e. relating to the General Allotment Act and to inherent sovereignty to find the nonexistence of tribal jurisdiction over non-Indian hunting and fishing.

The general rule of Montana is plain--tribes have no jurisdiction over non-Indians.

The court then, in dictum, listed several exceptions to the general rule. These exceptions, it might be noted, were not analyzed for consistency with Oliphant, Wheeler, or indeed, with the holding in Montana itself.

Nonetheless, the cases cited in Montana as exceptions to the general rule may be helpful to determine the quality and nature of jurisdiction included in the exceptions. The Court first referred to regulations of those who entered "consensual relationships" with the tribe or its members. Williams v. Lee, 358 U.S. 217 (1959), merely holds that the state cannot exercise jurisdiction over an Indian who makes a contract in Indian country. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-154 (1980), in the pages cited, says that a tribe can tax a non-Indian purchasing

cigarettes on trust land within a reservation.

A tax case decided by the Eighth Circuit Court of Appeals, Buster v. Wright, 135 F. 947 (8th Cir. 1905) is also cited. Buster finds that a non-Indian may be subjected to a license requirement of the Creek tribe even on privately owned land. The Eighth Circuit found that the Creek territory was not subject to the rule set out in Bates v. Clark, supra. Buster v. Wright is also apparently unique insofar as the acts of the tribal council were approved by the President of the United States. Moreover, it seems unique in that the allotments to the non-Indians were apparently not under the Allotment Act, see Montana v. U.S., but pursuant to deeds signed by the President of the tribe and the Secretary of the Interior.

The State thus suggests that the decision of the circuit court in Buster

should be given little weight as it refers to a clearly unique situation on several critical points.

In sum, in the "consensual" exceptions to the general rule set as in Montana, the Court indicated that the state could not force an Indian into state court with regard to a contract which was undertaken in Indian country, and that the tribe could tax non-Indians purchasing products on trust land within the reservation. The effect of Buster v. Wright remains problematic because of the unique factual and legal situation therein, especially when the language of the circuit court opinion is tested against the explicit language with regard to the allotment acts in Montana, and Bates v. Clark.

The second part of the Montana exception is as follows.

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on

> fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566. It is not too much to say that this Montana exception has inspired frenzied exertions on the part of the tribes to impress their jurisdiction upon non-Indians. Yet when the case authorities explaining and analyzing the actual parameters of the tribal authority are analyzed, the tribal authority is seen not to correspond with the tribal claims. Four cases are cited by the Court. Fisher v. Dist. County Court, 424 U.S. 382, 383 (1976) stands for the proposition that state courts do not have jurisdiction over an adoption proceeding "in which all parties are members of the tribe and residents of the northern Cheyenne Reservation."

Williams v. Lee, supra, is cited for the familiar rule that state jurisdiction is preempted when the state action infringes on the right of reservation residents to make their own laws and be ruled by them. In Williams, of course, the state of Arizona was forbidden to force an Indian into state court with regard to certain goods sold on the reservation.

Thus, the first two cases cited under the "political integrity" exception stand only for the proposition that state courts do not have jurisdiction over certain Indians with regard to acts which take place on the reservation.

Advocates of expansive tribal sovereignty who rely upon these two cases to support their interpretation of the Montana language are simply not justified. Fisher did not involve any non-Indian parties and therefore cannot stand for such a

proposition. Williams involved an Indian defendant and excused the Indian defendant from participating in the state court proceeding. Williams does not force a non-Indian defendant (or plaintiff for that matter) into tribal courts.

Moreover, the Court also cited as having particular relevance two cases decided around the turn of the century. In Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) a religious order argued that certain cattle had been dedicated to the benefit of the Indians and therefore were exempt from state taxation. The cattle were alleged to "graze upon lands included within the said reservation." 200 U.S. at 122. The religious order contended that the cattle could not be taxed by the state. The Supreme Court found that the religious orders unreservedly owned the cattle and that their claim to exemption from state taxation was

without "plausibility." Thomas v. Gay, 169 U.S. 264 (1898), also rejects a challenge to state authority on the reservation. Thomas held that a state can tax cattle owned by a non-Indian even though the cattle are grazed on the reservation on land leased from the Indians. The tax was "too remote and indirect to be deemed a tax upon the lands or privileges of the Indians." 169 U.S. at 273.

Thus two of the cases cited in the "political integrity" exception in Montana recognize immunity of Indian defendants from the jurisdiction of state courts. Two approve the jurisdiction of state courts on reservation land in taxation matters.

It is also important to emphasize that none of the cases within the "political integrity" exception subject any non-Indian to any civil jurisdiction of a tribal court. The attempt to make of these cases what they are not must be rejected. Moreover, it is

suggested that this is why, in the "political integrity" exception, the Court said only that the tribe "may also retain inherent power" over these matters. The use of the term "may" indicates an appreciation by the Court of the lack of definitive common law or statutory authority on the subject and a desire to await further elucidation on the issue before allowing tribal jurisdiction over non-Indians who were unable to participate in the tribal government.

In sum, the Oliphant, Wheeler, Montana triad indicate that, as a general rule, the tribes have no jurisdiction over non-Indians on fee lands. Such is consistent with the early cases of this Court and is consistent with the statutory and common law rule under which the purchaser of allotted lands acted. The tribe simply had no jurisdiction where it had no territory. Since fee lands were not

within the tribal territory, the tribes had no jurisdiction.

The tribal claim will no doubt be that two recent cases of the Court change the law. The first of these is National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. 845 (1985). In this case, however, the Supreme Court held only that the tribal court had the first chance to determine whether it had civil jurisdiction over non-Indians. The Court's "may" language in the Montana case with regard to that jurisdiction left that an open question. While the state may not agree that it is a wise use of judicial resources to remand the matter to the initial determination of the tribal court, it certainly cannot be said that National Farmers Union overrules Montana.

The second case often cited by the tribes is Iowa Mutual Insurance Company v.

LaPlante, 480 U.S. _____, 94 L.Ed.2d 10 (1987). In LaPlante, the court said:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See Montana v. United States, 450 U.S. 544, 565-566, 67 L.Ed.2d 493, 101 S.Ct. 1245 (1981); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-153, 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980); Fisher v. District Court, 424 U.S., at 387-389, 47 L.Ed.2d 106, 96 S.Ct. 943. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

94 L.Ed.2d at 21.

The tribes have read this language to mean that civil jurisdiction over all activities of non-Indians is presumptively in the tribe. This is, of course, a serious misreading of that language, for it completely ignores the citation by the court of the Montana, Confederated Tribes, and Fisher cases. Citation of these opinions

indicates only that jurisdiction as to the activities cited in the three opinions, would normally lie in the tribal court. Thus, to determine the meaning of the LaPlante citation, it is necessary to return again to Montana v. United States, 450 U.S. at 565-566, a task already completed here. Likewise, inspection of Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 152-153, indicates only that a tribe can collect a tax for sales made on trust lands to non-Indians. Fisher v. District Court, 424 U.S. at 387-389, as noted, indicates only that the state court does not have jurisdiction over an adoption proceeding in which all of the parties are members and residents of the particular reservation. LaPlante merely reiterates previous holdings of the court; the attempt to stretch LaPlante beyond plausibility is unwarranted.

The contrary conclusion, that is, that all non-Indian activity on reservation lands presumptively lies within tribal jurisdiction is simply unwarranted and sets up an unworkable dichotomy between criminal and civil matters.

It is apparent that one's rights might be severely affected by a civil proceeding. For example, a rifle, boat or house may be confiscated through civil means only yet the effect is far greater than a criminal proceeding which, for example, may result in a $25 fine. The dichotomy likewise sub silentio rejects the applicability of the Constitution to civil matters although this Court has regularly found the Constitution to be applicable. See, for example, Goldberg v. Kelly, 397 U.S. 254 (1970); Fuentes v. Shevin, 407 U.S. 67 (1972); Tinker v. Des Moines School District, 393 U.S. 503 (1969). Finally, even if the presumption language in

LaPlante is given broad effect, it does not compel a result favorable to the tribal position here. Montana establishes that non-Indians purchasing land under the General Allotment Act would not be subject to tribal jurisdiction. Thus, insofar as the lands at issue here were purchased under the authority of that Act, (or in the opinion of the State, contemporaneous act), they certainly should be free from tribal jurisdiction. The "specific . . . federal statute" requirement of LaPlante can thus be satisfied.

In sum, even if LaPlante is given the broadest possible reading, a reading which ignores the language and citations within the opinion, it may not have an effect here.

II

THE UNITED STATES CONSTITUTION DOES NOT ALLOW THE CONGRESS, EITHER ACTING ALONE OR JOINTLY WITH AN INDIAN TRIBE, TO DEPRIVE NON-INDIANS OF THEIR RIGHT TO GOVERN THEMSELVES.

As set forth above, Bates v. Clark, 95 U.S. 204 (1877), definitively established that, as a general rule, Indian country did not extend beyond the boundaries of Indian owned land (or land held in trust for Indians) until 1948. Moreover, Montana v. United States, 450 U.S. 544 (1981), established that Congress did not intend that non-Indians purchasing land under the Allotment Act would be subject to tribal jurisdiction. This would "defy common sense" because Congress clearly intended the reservations to be quickly terminated.

Thus common law and statutory law combined to limit tribal jurisdiction until at least 1948. In that year, of course, Congress enacted 18 U.S.C. § 1151 which extended the term "Indian country" to include fee lands within a reservation. Congress thereby took a positive step to increase the

jurisdiction of the United States in criminal matters over tribal members.[4]

Moreover, Congress, since 1948, and especially since the early 1960's, has taken various actions to strengthen tribal government. Congress has, for example, enacted the Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq. and the Indian Self Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 et seq.

Congressional interest in strengthening tribal governments is also argued to be demonstrated by budgeting for Indian programs.

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[4]The view of the state is that Congress did not intend by passage of 18 U.S.C. § 1151 to impose tribal civil jurisdiction on non-Indians. See supra, pp. 28-29. The inclusion of the fee lands on the reservation within the term "Indian country," however, has allowed tribal government advocates to make the arguments for expansive jurisdiction.

> Total discretionary budget authority requested for special Indian programs Government-wide, including programs in other functions such as income security and education, is expected to be $3.1 billion in 1989. Corresponding outlays are estimated to be $3.4 billion. These amounts do not include payments received by Indians from trust funds established for their benefit or from programs serving all qualified U.S. citizens.

Executive Office of the President, "Budget of the United States Government, Fiscal Year 1989," p. 5-87, 5-88.

What the foregoing pointedly demonstrates is that, at least until 1948, congressional enactments and federal policy prevented tribes from exercising expansive jurisdiction over non-Indians. After that period, especially in the 1960's and beyond, it has been argued that Congress has actively aided and abetted in the expansion of jurisdiction of tribes over non-Indians.

A vital linchpin of this analysis has been the idea that current federal policy informs the judicial inquiry requiring the reach of Indian sovereignty. See, McClanahan v. Arizona State Tax Comm., 411 U.S. 164, 172 (1973). For example, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), citing current federal legislation, stated that

> [S]tate jurisdiction is preempted 'if it interferes or is incompatible with federal or tribal interests reflected in federal law; unless. . . .

See also, California v. Cabazon Band of Indians, 480 U.S. ____, 94 L.Ed.2d 244, 259, n.19 (1987); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. ____, 94 L.Ed.2d 10, 18, n.5. Thus the argument, sub silentio until now, appears to be that while Congress in the pre-1948 period recogni ed that non-Indians on fee lands on the reservation had a right to govern themselves, the Congress, by enacting 18 U.S.C. § 1151, and by providing a

backdrop of legislation favoring tribal government, can and has deprived non-Indians on reservations of their right to self-government.

The question unanswered by the recent actions of Congress and by the preemption analysis is whether Congress acting alone or in conjunction with an Indian tribe can constitutionally deprive non-Indians of the right to govern themselves, especially on fee lands within the reservation.[5]

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[5]Because the Constitution does not apply to Indian tribes, see Talton v. Mayes, 163 U.S. 376 (1896), a non-Indian subjected to the jurisdiction of a tribe is deprived of his constitutional rights. The Indian Civil Rights Act is not, even in theory, the equivalent of the Constitution. For example, non-Indians may consistently with the ICRA, be excluded from participation in tribal government. Moreover, the federal courts are not available to redress violations of the Act, see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (except for habeas corpus), although such relief was once apparently

(Footnote Continued)

The issue is framed here in the context of whether a state may zone fee lands within a reservation. When a state or county zones, of course, it zones through a popularly elected body. All residents, regardless of race or affiliation, can vote for the members of the body. A regulation that only those with particular blood quantum could vote in a county election would be anathema and struck immediately as inconsistent with the Constitution. All county residents can likewise participate in any initiative, referendum, or recall which might be available under applicable state law. Any person can run for office. This is the

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(Footnote Continued)
thought possible. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). As the Statement of Interest above indicates, tribal courts and councils treat the ICRA with disdain and have made it a true dead letter. See, supra, pp. 2-12.

context in which the county at issue has zoned; the right to zone stands before the court as the right to self-government.

In place of zoning by a democratically elected body, however, the tribe seeks to impose zoning by hereditarily formed aggregation, whose membership is determined by the presence of a particular strain of blood. Only those privileged by descent can vote in tribal elections, hold tribal office, sit on tribal juries, or become members of the tribe. The tribe is, simply and directly, the quintessence of an undemocratic regime.

Can the United States deprive non-Indians of their right to govern themselves? The answer is clearly that it cannot.

It is axiomatic that the United States government, including Congress,

> is entirely a creature of the Constitution. Its power and authority have no other source. It can act only in accordance with all the limitations imposed by the Constitution.

Reid v. Covert, 354 U.S. 1, 5-6 (1957) (plurality opinion). For cases indicating approval of Reid v. Covert, see, Northern Pipeline Construction Company v. Marathon Pipeline Company, 458 U.S. 50, 67, n.17 (1982); Examining Board of Engineers v. Flores De Otero, 426 U.S. 572, 600 (1976); Kinsella v. U.S., 361 U.S. 235 (1960).

In Reid, Congress had provided that a military court could try the spouse of a person in the military service for a crime committed overseas; the precise issue was whether the spouse could be tried for murdering her soldier husband. The military courts had tried the two cases and pronounced sentence. The Supreme Court reversed.

> When the Government reaches out to punish a citizen who is abroad, the

> shield which the Bill of Rights and other parts of the Constitution provide should not be stripped away just because he happens to be in another land.

Reid v. Covert, 354 U.S. at 7. The Court also rejected the view that the treaty power could allow Congress to violate the Constitution. According to the Court:

> The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on Congress, or any other branch of government, which is free from the restraints of the Constitution.

354 U.S. at 16.

Reid is not, of course, an anomaly. The Reid decision was presaged by De Geofroy v. Riggs, 133 U.S. 258, 267 (1889) in which this Court said:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It

> would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.

In Boos v. Berry, ____ U.S. ____, 99 L.Ed.2d 333, 346 (1988), the Court this year quoted Reid, supra in determining that Bill of Rights protections could not be abrogated within the continental United States:

> it is well established that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."

The lesson of Reid, De Geofroy and Boos is simple and straightforward. Congress cannot through its legislation deprive an American citizen of his constitutional rights whether abroad or within the confines of the continental United States.

Yet, that is exactly what may occur here. The right to self-government is the

most basic right and encompasses the entire Bill of Rights. The right to self-government was, of course, an impetus to the very formation of the Union. Indeed the Declaration of Independence itself states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.--That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. . .

Declaration of Independence, July 4, 1776.

The Federalist Papers assured the citizenry who were to adopt the Constitution that self-government was the essence of what the federal union was. Federalist No. 39, written by James Madison, states in part:

> We may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for

> a limited period, or during good behavior. It is essential to such a government, that it be derived from the great body of the society, not an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic.

Id. at 251 (emphasis added).

This Court likewise has stated that:

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.

Duncan v. McCall, 139 U.S. 449, 461 (1891). See also, Nevada v. Hall, 440 U.S. 410, 426 (1979): "In this nation each sovereign governs only with the consent of the governed."

Until quite recently, it would have been absurd to argue in a court of the United States that a tribe had general civil jurisdiction over a non-Indian. Such jurisdiction had never been recognized and indeed was antithetical to then existing statutory and case law. It is only recently that tribal advocates and some lower courts have taken very aggressive stances with regard to such civil jurisdiction, arguing essentially that recent congressional pronouncements have legitimized the exercise of such authority over non-Indians. Yet enactments of the United States Congress cannot deprive non-Indians of the right to govern themselves.

When a court relies upon congressional actions, including 18 U.S.C. § 1151 and recent enactments intended to generally strengthen tribal government, to discover a new right of the tribes to exercise civil

jurisdiction over non-Indians and by so doing deprives them of self-government, it has ascribed to Congress an intent to act unconstitutionally.[6]

The attempts of the tribes in this case to deprive the local residents of their right to self-government should be rejected.

This analysis does not disturb the proper scope of tribal self-government. This Court's opinions in Oliphant, Wheeler, and Montana point the way. These cases, taken together, stand for the proposition that a

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[6]The same result follows even if the recent legislation is deprived of all of its force, for the very existence of tribes in law is dependent upon their recognition by the federal government. See U.S. Const. Art. I, § 8, cl. 3. Only the sustained recognition by the federal government of the tribes embodied in Volume 25 of the United States Code, and elsewhere, permits the argument that tribes have ousted the non-Indians of their right to self-government.

tribe retains the power of self-government only to the extent necessary to protect internal relations. The tribal advocates have missed the point of the Montana exceptions by declining to read the cases which define their reach.

CONCLUSION

In a recent case the Eighth Circuit Court of Appeals considered whether a tribe has jurisdiction over nonmember Indians in the criminal context. Chief Judge Lay, in determining that the tribe did not have such jurisdiction, stated

> because the Petitioners, like the non-Indian residents of the Devil's Lake Reservation, cannot vote in tribal elections, hold tribal office, sit on tribal juries, become members of the Devil's Lake Sioux Tribe, nor significantly share in tribal disbursements . . . the powers that may be exercised over them are appropriately limited.

Greywater v. Joshua, 846 F.2d 468, 493 (8th Cir. 1988).

Judge Lay's analysis in Greywater, an analysis based firmly upon the decisions of this Court, points the way to a decision here. Tribes retain power over their own members with regard to internal relations of the tribe. The tribe may not, however, go beyond those limits to deprive non-Indians of their own right to self-government, a right for which the Revolution was fought, and a right guaranteed by the United States Constitution.

This is not, then, just a "zoning case" because it squarely raises questions of power and representative government. The State of South Dakota urges this Court to reverse the

Judgments of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

Excerpts from Tribal Employment Rights Ordinance of the Oglala Sioux Tribe of the Pine Ridge Reservation, Ordinance No. 84-08, (as amended).

TABLE OF CONTENTS

PAGE

CHAPTER 6--

SCOPE OF INDIAN PREFERENCE----- A-3

CHAPTER 11--

SANCTIONS---------- A-5

CHAPTER 14--

ONSITE INSPECTIONS---------- A-9

CHAPTER 17--

ENFORCEMENT OF ORDERS---------- A-10

CHAPTER 6

SCOPE OF INDIAN PREFERENCE

A. All covered employers shall have grant preference to resident Indian, without regard to tribal affiliation, over nonresident Indians in hiring, promotion, training, and all other elements of employment.

B. All covered employers shall grant preference to Indians, whether resident or nonresident, over non-Indians in hiring, promotion, training, and all other elements of employment.

C. All covered employers shall grant preference to certified Indian owned firms, whose principal places of business are located within the exterior boundaries of the Pine Ridge Reservation, without regard to tribal affiliation, over certified Indian-owned firms whose principal places of business

are located without such boundaries, in awarding contracts and subcontracts.

D. All covered employers shall grant preference to certified Indian-owned firms without regard to the location of their respective principal places of business, over non-certified firms with some Indian Ownership, in awarding contracts and subcontracts.

E. All covered employers shall give preference to non-certified firms with some Indian ownership, whose principal places of business are located within the exterior boundaries of the Pine Ridge Reservation, without regard to tribal affiliation, over non-certified firms with some Indian ownership, whose principal places of business are located without such boundaries in awarding contracts and subcontracts.

F. All covered employers shall grant preference to non-certified firms with some Indian ownership, without regard to the location of their respective principal places of business, over non-Indian-owned firms, in awarding contracts and subcontracts.

CHAPTER 11

SANCTIONS

Any one or combination of the following sanctions shall be imposed by the Commission upon its determination that a person has failed to comply with any requirements set forth in this Ordinance, in any and all supplementary ordinances, or in any and all rules, regulations, and/or guidelines promulgated by the TERO Commission.

A. Imposition of a civil monetary fine not to exceed the amount of Five Hundred and 00/100 Dollars ($500.00) per violation.

Each day on which a person has been determined to have been out of compliance with any TERO requirements shall constitute a separate violation.

B. Suspension or termination of the person's current conduct of business within the exterior boundaries of the Pine Ridge Reservation, provided that such person be granted a reasonable period of time during which to remove its equipment and property located on the Reservation and to arrange with another person for the assumption of any of its outstanding contractual obligations.

C. Prohibition of the persons engaging in the future conduct of business within the exterior boundaries of the Pine Ridge Reservation for a definite or indefinite period.

D. Prohibition of monetary or other appropriate relief as and for damages to compensate any person harmed as a result of the noncompliance at issue.

E. Order the immediate termination by the covered employer of any individual(s) hired in contravention of any TERO requirements relative to Indian preference in the selection and hiring of employees.

F. Order the immediate recession of any contract(s) and/or subcontract(s) entered into by the covered employer in contravention of any TERO requirements relative to Indian preference in contracting and subcontracting.

G. Order the employment, promotion, and training by the covered employer of any Indian individual(s) adversely affected by the noncompliance with any TERO

requirements relative to Indian preference in employment opportunities.

H. Order the award of a contract or subcontract by a covered employer to any qualified Indian-owned firm adversely affected by the noncompliance with any TERO requirements relative to Indian preference in contracting and subcontracting.

I. Order the award of back pay by the covered employer to any Indian individual(s) adversely affected by the noncompliance with any TERO requirements relative to Indian preference in employment opportunities.

J. Order the covered employer to make such changes in its policies, procedures, and/or conduct as are deemed necessary for the purpose of securing compliance with any TERO requirements.

K. Such other or further relief and/or sanctions as the Commission should deem just and proper.

CHAPTER 14

ON-SITE INSPECTIONS

The TERO Director, the staff members within the TERO Office, and the members of the TERO Commission shall have the right to conduct periodic on-site inspections at any time during the actual operation of the business of any covered employer, in order to monitor compliance by such employer with the requirements set forth with any and all rules, regulations, and/or guidelines promulgated by the TERO Commission, and with any order issued by the Commission. During the period of any such on-site inspection, such TERO personnel and officials shall have the right to speak with any contractor, subcontractor, or employee working on the

site, so long as such conversation does not interfere with the operation of the business. In addition, such TERO personnel and officials shall have the right to inspect any and all records and other written materials maintained on-site by a covered employer, which cannot be deemed confidential for valid business purposes. Any and all such written materials so inspected shall be subject to the requirements relative to strict confidentiality, as prescribed by and set forth in Chapter 13 of this Ordinance.

CHAPTER 17

ENFORCEMENT OF ORDERS

The Police officers of the Oglala Sioux Tribe are hereby expressly authorized and directed to take whatever reasonable legal enforcement action is necessary to fully enforce any and all, cease and desist and related order as are, from time to time,

properly issued by the Tribal Employment Rights Commission. Such an order issued by the Commission shall not require an accompanying or affirming judicial order, so as to render the order legally enforceable.

(9) (8) (9)

Nos. 87-1622, 87-1697, and 87-1711

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS, COUNTY OF YAKIMA, *et al.*

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QUESTION PRESENTED

Whether either congressional delegation or "inherent sovereign power" authorizes tribal zoning jurisdiction over non-Indians on fee land.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT	4
Background	4
Proceedings Below	6
INTRODUCTION AND SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. INDIAN ZONING AUTHORITY DOES NOT EXTEND TO NON-INDIANS ON FEE LAND	11
A. Authority To Zone Non-Indian Lands Must Derive From Congressional Mandate Or "Inherent Authority"	11
1. *Congress has not authorized Indian zoning of non-Indian fee lands*	12
2. *Indian "inherent sovereign powers" do not generally extend to non-Indians on fee lands*	15
B. Due Process Concerns Require A Narrow Construction Of Tribal Authority Over Non-Indians	19
II. THE NINTH CIRCUIT'S JURISDICTIONAL SCHEME IS UNWORKABLE	22
CONCLUSION	27

TABLE OF AUTHORITIES

CASES: Page

Agins v. City of Tiburon, 447 U.S. 255 (1980) 24
Ashwander v. TVA, 297 U.S. 288 (1936) 22
Avery v. Midland County, 390 U.S. 474 (1968) 20
Berman v. Parker, 348 U.S. 26 (1954) 23
California Coastal Comm'n v. Granite Rock Co., 107 S.Ct. 1419 (1987) 25
Cipriano v. City of Houma, 395 U.S. 701 (1969) 20
City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976) 24
City of Mobile v. Bolden, 446 U.S. 55 (1980) 20-21
City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) 20
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 24
DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 108 S.Ct. 1392 (1988) 22
Dunn v. Blumstein, 405 U.S. 330 (1972) 20
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 23, 24
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 10
Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) 24
Hadacheck v. Sebastian, 239 U.S. 394 (1915) 24
Hadley v. Junior College District, 397 U.S. 50 (1970) 20
Kleppe v. New Mexico, 426 U.S. 529 (1976) 25
Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) 20
Loving v. Virginia, 388 U.S. 1 (1967) 22
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 24
McKelvey v. United States, 260 U.S. 353 (1922) 25
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 11
Montana v. United States, 450 U.S. 544 (1981) ..... *passim*
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 13, 26
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 21-22

TABLE OF AUTHORITIES—Continued

Page

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 10, 15, 19
Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 24
Puyallup Tribe, Inc. v. Washington Game Dep't, 433 U.S. 165 (1977) 14
Reynolds v. Sims, 377 U.S. 533 (1964) 20
Rice v. Rehner, 463 U.S. 713 (1983) 11
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 21
United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) 17, 26
United States v. Carolene Products Co., 304 U.S. 144 (1938) 22
United States v. Mazurie, 419 U.S. 544 (1975) 21
United States v. Wheeler, 435 U.S. 313 (1978) 11, 15, 16
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 24
Wesberry v. Sanders, 376 U.S. 1 (1964) 20
Williams v. Lee, 358 U.S. 217 (1959) 11-12
Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 24
Yick Wo v. Hopkins, 118 U.S. 356 (1886) 20
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 23, 24

CONSTITUTIONAL PROVISION:

U.S. Const. Amend. XV § 1 20

STATUTES:

Clean Air Act, 42 U.S.C. §§ 7401-7642 25
Clean Water Act (1972 and 1977 Amendments), 33 U.S.C. §§ 1251-1376 25
Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 25
16 U.S.C. § 1456(c) 25
16 U.S.C. §1456(d) 25
Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9657 25

TABLE OF AUTHORITIES—Continued

	Page
Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524	25
33 U.S.C. § 1508(b)	25
Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. §§ 201-209	25
30 U.S.C. § 201(a)(2)(B)	25
Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784	24
43 U.S.C. § 1712	24
43 U.S.C. § 1720	24
43 U.S.C. § 1752(d)	24
Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901-5920	24-25
42 U.S.C. § 5919(e)	25
General Allotment Act of 1887, 25 U.S.C. §§ 331-358	4, 10, 12, 13, 14, 15
Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*	13, 14-15
Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341	21
Mineral Leasing Act Revision of 1960, 30 U.S.C. §§ 181 *et seq.*	24
30 U.S.C. § 189	24
Mining Act of 1872, 30 U.S.C. §§ 22 *et seq.*	24
30 U.S.C. § 22	24
30 U.S.C. § 26	24
30 U.S.C. § 28	24
30 U.S.C. § 43	24
Organic Administration Act of 1887, 16 U.S.C. §§ 473-482	24
16 U.S.C. § 480	24

TABLE OF AUTHORITIES—Continued

	Page
Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1336	25
43 U.S.C. § 1331(a)	25
43 U.S.C. § 1331(d)	25
Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987	25
Safe Drinking Water Act, 42 U.S.C. § 300(f)-(j)	25
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328	25
Taylor Grazing Act, 43 U.S.C. § 315	24
43 U.S.C. § 315n	24
TREATY:	
Treaty with the Yakimas, 12 Stat. 951 (1855)	4, 13, 14
OTHER AUTHORITIES:	
N. Williams, *American Land Planning Law* (1974)	26
S. 2755, 73d Cong., 2d Sess. (1934)	13
H.R. 7902, 73d Cong., 2d Sess. (1934)	13
78 Cong. Rec. 11,123 (1934)	13
National Association of Counties, *Counties with Indian Reservations or Trust Lands* (May 11, 1983)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1622, 87-1697, and 87-1711

PHILIP BRENDALE,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,

Respondents.

STANLEY WILKINSON,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

COUNTY OF YAKIMA, *et al.*,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS, COUNTY OF YAKIMA, *et al.*

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

These related cases concern the authority of state and local governments to regulate the use of land held in fee simple by non-Indians within the territory of an Indian reservation.[1] It is estimated that 350,000 non-Indians live on reservations.[2] Thirty-three States have one or more Indian reservations within their boundaries[3]; at least 379 counties have Indian reservations on which land is individually owned.[4] These state and local governments have innumerable land use regulations, including zoning, which are routinely applied to reservation land owned by non-Indians. Thus, the Ninth Circuit's decision that the Yakima Nation has jurisdiction to regulate in this case is of profound concern to *amici*.

As a result of federal policy in the 1800s, much reservation land is not actually owned by tribes or tribal members, but is owned by non-Indians. On the Yakima reservation, for example, non-Indians outnumber Indians four to one.

The checkerboard pattern of tribal and nontribal land ownership presents a difficult problem for state and local governments, as well as for the tribes, not only in regulating land use but in such areas as taxation and business and environmental regulation as well. Although a tribe clearly has an interest in controlling its own affairs, that interest must be reconciled with the interests of the state and local governments that provide many of the services needed by all citizens, Indian and non-Indian alike, who reside on the reservation. Such services cost money and are frequently provided most efficiently by state or local government. To serve their citizens, state and local governments must have the necessary authority to guide rural development by effective regulation.

[1] Throughout this brief we use the word non-Indians to include Indians who live on the reservation of a tribe of which they are not members.

[2] Brief of the State of Washington, *et al.*, as *amici curiae* in support of the petitions for writs of certiorari in these cases, at 2.

[3] *Ibid.*

[4] National Association of Counties, *Counties with Indian Reservations or Trust Lands* (May 11, 1983).

The right of Indian tribes to make their own laws and "be ruled by them" is limited by the rights of non-Indians to be free of regulation by a government in which, because of race, they cannot participate or vote. In general, the inherent sovereign powers of an Indian tribe do not extend to the activities or property of non-Indians. *Montana v. United States*, 450 U.S. 544, 564 (1981). A rule giving civil jurisdiction to the tribe effectively disenfranchises non-Indians with regard to actions that significantly affect their livelihood and property.

Amici submit that the decision of the Ninth Circuit with respect to the Wilkinson property, styled *Whiteside II* by the court of appeals (Nos. 87-1697 and 87-1711), is wrong.[5] Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[6]

[5] *Amici* take no position with respect to that portion of the Ninth Circuit's decision that deals with the Brendale property, styled *Whiteside I* by the court of appeals (No. 87-1622). The County of Yakima did not appeal from the district court's decision denying county zoning in the closed area of the Reservation and does not directly challenge in this Court the Ninth Circuit's affirmance of that decision.

[6] The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk.

STATEMENT

These consolidated cases concern the limits of tribal authority over non-Indians. Specifically, they raise the question of the authority of tribal government to regulate the use of land owned in fee by non-Indians. Resolution of that question requires consideration of the interests of two sovereigns under the federal system: Yakima County, on the one hand, and the Yakima Indian Nation, on the other.

Background

Respondent Yakima Nation is a confederation of fourteen distinct Indian tribes that banded together in the Nineteenth Century to negotiate a treaty with the United States. Pet. App. 36a.[7] Under the 1855 Treaty with the Yakimas, the Yakima Reservation was established for the exclusive use and benefit of the Yakima Nation. *Id.* at 37a. The Reservation encompasses 1.3 million acres, of which eighty percent is held in trust by the United States for the benefit of the tribe or its individual members. *Ibid.* The remaining twenty percent was divested under the General Allotment Act of 1887, 25 U.S.C. §§ 331-358, and is held in fee simple by both Indians and non-Indians. Pet. App. 37a.

In 1954, the Yakima Nation, through a Tribal Resolution, divided the Reservation into two areas, the so-called closed and open areas. Pet. App. 114a. Most of the trust land lies within the closed area, which occupies the western two-thirds of the Reservation. *Id.* at 38a. Of the 807,000 acres of the closed area, 740,000 acres are in Yakima County. *Ibid.* About 25,000 acres of the closed areas are owned in fee. *Ibid.* The closed area is restricted to members of the Yakima Nation, its employees, and permittees, in order to protect the area's natural resources, natural foods, medicines, wildlife, and environment. *Id.* at 114a-116a. Ninety percent of the Yakima

[7] References are to the appendix to the petition for a writ of certiorari in *Wilkinson v. Confederated Tribes*, No. 87-1697.

Nation's income is derived from the closed area. *Id.* at 136a. There are no permanent residents in the part of the closed area located in Yakima County. *Id.* at 39a.

Yakima County, under a comprehensive zoning ordinance adopted in 1972, has zoned the fee lands in the closed area as "forest watershed." Pet. App. 121a. The stated purpose of the forest-watershed district is "to facilitate land and water conservation while accommodating residential, recreational and commercial uses." *Ibid.* Within the district, diverse uses are permitted, including single-family dwellings, campgrounds, small overnight lodging facilities, restaurants and bars, certain stores, service stations, marinas, sawmills, and dams for the production of electricity. *Ibid.* The County does not apply its zoning laws to trust lands. *Ibid.*

The Yakima Nation adopted a zoning ordinance in the same year as the County. Under that ordinance, which was an expanded version of one modeled on the County's comprehensive ordinance, the closed area is classified as a "special use district," in which only the following uses are allowed:

1. Harvesting wild crops;
2. Grazing, timber production, or open field crops;
3. Hunting or fishing by tribal members;
4. Camping in temporary structures;
5. Tribal camps for the education and recreation of tribal members; and
6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of tribal resources.

Pet. App. 119a. No other building or permanent structure or any appurtenances thereto are allowed. *Id.* at 120a.[8]

[8] The ordinance also provides that any authorized structure shall be set back 200 feet from any waterway. Pet. App. 120a.

In "sharp contrast" to the closed area is the open area of the Reservation. Pet. App. 40a. The open area consists of approximately 350,000 acres, to which non-Indians have unlimited access. *Id.* at 83a. Almost half of the open area is owned in fee. *Id.* at 40a. Only 5,000 Indians live in the open area; 20,000 non-Indians live there. *Id.* at 84a. Three incorporated towns—Toppenish, Wapato, and Harrah—are located in the open area. *Id.* at 51a. Most of the open area consists of rangeland and land used for agriculture, commercial purposes, and residential development. *Id.* at 39a-40a.

While Yakima County provides no services in the closed area, it provides all traditional county services in the open area, including police and fire protection and water and sewer service. The County has built and maintains about 500 miles of roads. Pet. App. 52a. It provides schools for Indians and non-Indians alike. *Id.* at 88a.

Proceedings Below

Petitioner in No. 87-1697 (*Whiteside II*), Stanley Wilkinson, owns in fee a forty-acre tract of land in the open area of the Reservation, three miles from the City of Yakima. Pet. App. 47a. Under the Yakima Nation zoning ordinance, his property is designated as "agricultural," which indicates that the "principal use of the land is for agricultural purposes." *Id.* at 42a. Under this classification, all buildings are prohibited except agricultural buildings, buildings on public parks and playgrounds, and single-family dwellings. *Ibid.* The minimum lot size is five acres. *Ibid.*

Under the Yakima County zoning ordinance, however, the Wilkinson property is classified as "general rural," one of three districts that replaced a prior agricultural classification. The general rural district "is intended to 'provide protection for the county's unique resources and land base;' 'minimize scattered rural developments . . . by encouraging clustered development;' and 'permit only

those uses which are compatible with [the] rural character.'" Pet. App. 45a; see also *id.* at 52a. Nevertheless, the general rural district, particularly with a special use permit, allows a substantially broader range of uses than is allowed under the Yakima Nation's agricultural classification. *Id.* at 44a-45a. The minimum residential lot size under the County's general rural classification is as small as one-half acre, although the average size of lots in a subdivision must be at least one acre. *Id.* at 46a.

In 1983, Wilkinson sought permission from the Yakima County Planning Department to subdivide thirty-two acres into twenty lots, ranging in size from 1.1 to 4.5 acres, to be used for single-family dwellings. Pet. App. 48a. Wilkinson filed an environmental checklist to allow the Planning Department to determine whether an environmental impact statement was required. *Id.* at 48a-49a. Ultimately, after Wilkinson agreed to modify his proposal, the Department issued a declaration of non-significance. *Id.* at 49a. The Yakima Nation appealed to the County Board of Commissioners, and the Board affirmed. *Id.* at 50a.

The Yakima Nation then filed suit to challenge this decision in the District Court for the Eastern District of Washington. As summarized by the district court, the complaint sought a declaration that the Yakima Nation had "exclusive and paramount" jurisdiction over land use in the open area of the Reservation and an injunction against the County's assertion of jurisdiction. Pet. App. 34a-35a. The district court held that the Yakima Nation had no jurisdiction to zone Wilkinson's property. *Yakima Indian Nation v. Whiteside (Whiteside II)*, Pet. App. 33a-79a. The holding was based on the district court's extensive findings of fact in conformance with standards set forth in this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). See Pet. App. 65a. Specifically, the court concluded that "Wilkinson's

proposed development does not pose a threat to the 'political integrity', the 'economic security' or the 'health and welfare' of the Yakima Nation." *Id.* at 67a; see also *id.* at 53a-55a. The court also found that "the Yakima County zoning scheme is more protective of the Open Area's agricultural lands than the Yakima Nation's 'agricultural' use district." *Id.* at 53a.

Petitioner in No. 87-1622 (*Whiteside I*), Philip Brendale, owns in fee 160 acres of land in the forested portion of the closed area. Pet. App. 123a. In 1982, Brendale filed four contiguous short plat applications with the Yakima County Planning Department, which issued a declaration of non-significance and approved the applications. *Id.* at 124a. In 1983, Brendale submitted a long plat application to divide one of his newly platted twenty-acre parcels into ten two-acre lots, for use as summer cabin sites. *Id.* at 125a. The County Planning Department issued another declaration of non-significance. *Id.* at 125a-126a. Yakima Nation appealed to the County Board of Commissioners, which held that the County had jurisdiction over the zoning of fee land, but agreed that an environmental impact statement was required. *Id.* at 126a-127a.

As in *Whiteside II*, the Yakima Nation challenged the County's assertion of jurisdiction in federal court, seeking the same relief on the same grounds. Pet. App. 109a-110a. In the Brendale case, in contrast to the Wilkinson case, the district court held that the Yakima Nation had exclusive jurisdiction over lands held in fee by non-Indians in the closed area of the Yakima Reservation. *Yakima Indian Nation v. Whiteside (Whiteside I)*, Pet. App. 108a-171a. The district court determined that the Brendale development "pose[d] a threat to the political integrity, the economic security and the health and welfare of the Yakima Nation." Pet. App. 144a. Although the proposal endangered significant economic interests, the threat to the cultural and spiritual values of the

closed area was of paramount concern. *Id.* at 144a-145a. Under *Montana*, the court held, these findings required a ruling for the Yakima Nation. *Id.* at 142a-145a.

Whiteside I and *II* were consolidated on appeal to the Ninth Circuit. The court of appeals held that the Yakima Nation has the authority to regulate land use by non-Indians on the entire Reservation, closed and open areas alike. Citing *Montana*, the court found that zoning "traditionally has been considered an appropriate exercise of the police power of a local government, precisely because it is designed to promote the health and welfare of its citizens." Pet. App. 21a-22a.

After concluding that the Yakima Nation had the authority to zone land within the Reservation, the court conducted a balancing test to determine whether the tribe's interests outweighed the County's interests in zoning within the Reservation. With respect to the Brendale property located within the closed area (*Whiteside I*), the Ninth Circuit agreed with the district court that the County's application of the zoning classification to the closed area threatened significant tribal interests in "maintaining the character of the closed area." Pet. App. 27a. With respect to the Wilkinson property located within the open area (*Whiteside II*), however, the court remanded the case to the district court for an identification and balancing of tribal and county interests in zoning the land. Pet. App. 31a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Indian authority over non-Indians derives solely from congressional delegation or inherent sovereign power. Neither source of authority provides a general ground for tribal authority to impose land use regulation on land owned in fee by non-Indians.

Congress has not authorized Indians to impose land use regulation on non-Indian fee land. Indeed, relevant fed-

eral statutes evince an intent to divest Indians of any jurisdiction over fee lands. The General Allotment Act of 1887, for example, was intended to divest the tribes of both their lands and jurisdiction over the lands by granting individual Indians fee simple title to parcels on the reservations.

Similarly, it is common ground that tribal sovereign authority is limited in nature. Indian tribes have a "diminished status as sovereigns" and "have lost any 'right of governing every person within their limits except themselves.'" *Montana v. United States*, 450 U.S. 544, 565 (1981), *quoting Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring). Thus, as a general rule, the inherent sovereign power of Indians does not extend to non-Indians at all. Indian tribunals have no jurisdiction over non-Indians in criminal matters. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

In civil cases, inherent Indian jurisdiction is narrowly limited to that necessary "to protect tribal self-government or to control internal relations." *Montana*, 450 U.S. at 564. The undisturbed findings of the district court disclose that the County's zoning ordinance applicable to land in the open area of the Reservation poses no threat to the political integrity, economic security, or health or welfare of the Yakima Nation. Under *Montana*, the court of appeals erred in concluding that Indian jurisdiction existed.

In this case, Indian jurisdiction is particularly problematic because non-Indians are excluded by virtue of their race from participating in tribal government. The tribe's exercise of zoning authority over non-Indians thus would threaten the citizen's fundamental right to have a voice in the government by which he is regulated. It does so, moreover, on the undeniably invidious basis of race. These lurking constitutional defects require a narrow construction of the tribe's authority, that is, a holding that

it does not include the authority to zone land held in fee by non-Indians.

Finally, the Ninth Circuit, while recognizing that effective land use regulation requires comprehensive planning, completely overlooked the practical consequences of its decision on the County's zoning authority. Zoning is not the kind of regulation that allows sharing authority on a case-by-case basis. Permitting the Yakima Nation to prescribe zoning for the non-Indian fee lands in this case creates the possibility of conflicting regulation, which could disrupt the County's comprehensive zoning plan not only for those lands, but for county lands outside the Reservation.

ARGUMENT

I. INDIAN ZONING AUTHORITY DOES NOT EXTEND TO NON-INDIANS ON FEE LAND.

A. Authority To Zone Non-Indian Lands Must Derive From Congressional Mandate Or "Inherent Authority."

"The sovereignty that the Indian tribes retain is of a unique and limited character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). "It exists only at the sufferance of Congress and is subject to complete defeasance." *Id.* at 323; *Rice v. Rehner*, 463 U.S. 713, 719 (1983). The limitations on Indian sovereignty "rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Wheeler*, 435 U.S. at 326.

In particular, "[e]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. 544, 564 (1981); *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Williams v. Lee*, 358 U.S. 217,

220 (1959). For this reason, the authority of a tribe to regulate the conduct of non-Indians must derive either from congressional delegation or from the "inherent sovereign powers" of the tribe. *Montana*, 450 U.S. at 565.

Thus, in order for the Yakima Nation to prevail in this case on its claim of authority to regulate fee lands owned by non-Indians, it must show either that such authority has been delegated by Congress or that it is an inherent power essential to the protection of tribal self-government. Neither source of power exists in this case.

1. *Congress has not authorized Indian zoning of non-Indian fee lands.*

No federal statute authorizes tribes to regulate the use of fee lands held by non-Indians. No statute even hints at that authority. To the contrary, the only federal statutes that bear on the issue presented here suggest that Congress has divested Indians of authority over fee lands.

The General Allotment Act of 1887, 25 U.S.C. §§ 331-358, authorized the President to allot Indian trust lands to individual Indians in fee. The fee lands at issue in this case were originally allotted pursuant to this Act to members of the Yakima Nation and ultimately passed to non-Indians. As this Court explained in detail in *Montana*, Congress foresaw that allotted lands might eventually be owned by non-Indians and intended the cessation of tribal jurisdiction over those lands. "There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with dissolution of tribal . . . jurisdiction." 450 U.S. at 559 n. 9. The Court went on to say: "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Ibid.*

As the Court noted in *Montana*, 450 U.S. at 559 n.9, Congress repudiated the Allotment Act's policy of allotment and sale of surplus reservation land when it enacted the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* That repudiation, however, did not itself alter "the effect of the land alienation occasioned by that policy." *Montana*, 450 U.S. at 559 n.9.

In fact, the legislative history of the Reorganization Act confirms that Congress did not intend to confer on the tribes jurisdiction over non-Indian owners of fee land. The original version of the bill included a section establishing federal municipal corporations on the reservation that would have all of the functions customarily exercised by local government. H.R. 7902, 73d Cong., 2d Sess. §§ 2, 4a (1934), and S. 2755, 73d Cong., 2d Sess. §§ 2, 4a (1934). That government presumably would have had jurisdiction over non-Indian landowners on reservations. Before the bill passed, however, the proposal for federal municipal corporations was dropped; and the Committee on Indian Affairs "eliminated . . . from the bill as originally presented the right of the Indians to make laws upon the reservations." 78 Cong. Rec. 11,123 (1934) (statement of Sen. Wheeler). *See generally New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 326 (1983).

Although the federal government's policy regarding allotment of land to the Indians has changed over the years, the General Allotment Act has never been repealed, and it remains the clearest indication of congressional policy toward lands owned in fee on a reservation: Indian jurisdiction has been divested.[9]

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[9] The Ninth Circuit concluded that the Treaty with the Yakimas, 12 Stat. 951 (1855), explicitly authorizes the Nation to regulate non-Indian fee land because the "United States agreed

In sum, Congress has not only failed to authorize Indian jurisdiction over fee lands, it has expressed a clear intent to divest Indians of that jurisdiction. The policies underlying the Allotment Act were clearly aimed at divesting tribal sovereign authority over non-Indians on fee land. Congressional intent is further evidenced by Congress's failure to close the open areas of reservations, authorize condemnation of lands owned in fee for transfer to tribal governments, or otherwise indicate its disapproval of the assumption of jurisdiction by state and local governments.[10] Even the Indian Reorganization Act

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that the Yakima Nation reserved to itself and was guaranteed a right to its 'own government' and its 'own laws.'" Pet. App. 17a. This conclusion, however, begs the question whether the Yakima Nation's "own government" and "own laws" extend to fee land owned by non-Indians.

The provision of the Treaty reserving land "for the exclusive use and benefit" of the Yakima Nation is similarly inapposite to this case. The reservation of lands through the Treaty was substantially modified by the General Allotment Act of 1887, through which tribal lands were allotted in fee. *See Montana*, 450 U.S. at 559. As the Court observed in *Montana*, "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." 450 U.S. at 561, *citing Puyallup Tribe, Inc. v. Washington Game Dep't*, 433 U.S. 165, 174 (1977). Thus, the original status of all lands within the Yakima Reservation as trust lands has no bearing on the authority that the tribe now has over lands freely alienated under the Allotment Act.

[10] Yakima County has regulated land use since 1946; it enacted a comprehensive zoning ordinance in 1965. Pet. App. 5a. The County has repeatedly exercised authority over deeded land on the Reservation, processing 148 short plats and 14 long plats, including one for the Tribe itself (Transcript of Proceedings in *Whiteside II* (Tr.) 455); issuing 780 building permits; and processing 44 special use permit files, 19 variances, and 11 rezoning applications. Tr. 498, 538.

Yakima County also has, in addition to its comprehensive zoning regulations, other land use regulations applicable to fee land. It imposes standards for streets, water, sewage, drainage, parks and recreation areas, and school sites. Pet. App. 46a. As man-

of 1934, although it encouraged tribal self-determination and repudiated the assimilationist policies underlying the Allotment Act, contained no legal grant of tribal jurisdiction over lands held in fee by non-Indians. Thus, neither the language nor the legislative history of relevant federal legislation supports tribal jurisdiction over lands held in fee by non-Indians.

2. *Indian "inherent sovereign powers" do not generally extend to non-Indians on fee lands.*

The "inherent sovereign powers" of Indian tribes over the conduct of non-Indians are extraordinarily limited. In the criminal area, they have no inherent power over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). Absent congressional authorization or treaty provision, a tribal court may not exercise criminal jurisdiction over nonmembers. *Id.* at 195, 210.

Although *Oliphant* determined only that inherent tribal authority was lacking in criminal matters, the "principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to activities of nonmembers of the tribe." *Montana*, 435 U.S. at 565. Thus, in *Montana*, this Court held that the Crow Indian Tribe had no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. Relying on its decision in *United States v. Wheeler*, 435 U.S. at 323, the Court held that "through their original incorporation into the United States as well as through specific treaties and

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dated by state law, the County regulates certain activities adjacent to the shorelines (*ibid.*), and reviews the potential impact of all non-exempt land use actions. *Id.* at 46a-47a. It attempts to control development on flood plains as a condition of participating in the federal flood insurance program. *Id.* at 46a.

As noted (page 2, *supra*), Indian reservations are found within thirty-three States, and land is individually owned on reservations in at least 379 counties.

statutes, the Indian tribes have lost many of the attributes of sovereignty." *Montana*, 450 U.S. at 563. The areas in which implicit divestiture of sovereignty has occurred "'are those involving the relations between an Indian tribe and nonmembers of the tribe.'" *Id.* at 564, *quoting Wheeler*, 435 U.S. at 326 (emphasis deleted).

The Court found that "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations." 450 U.S. at 564. Thus, such regulation could not be sustained by "general principles of retained inherent sovereignty." *Id.* at 565. Inherent Indian authority governs only those who "enter consensual relationships with the tribe or its members" or whose "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.[11]

The Ninth Circuit, in holding that both the closed and open areas were subject to Indian zoning authority, misapplied the *Montana* standard. The court held that the County's zoning authority would threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. In reaching its conclusion, however, the Ninth Circuit misread *Montana* and radically expanded the concept of inherent Indian sovereignty. It ignored, moreover, the factual findings of the district court.

The language of the *Montana* opinion carefully limits Indian jurisdiction over non-Indians to that "necessary

[11] No argument can be made in this case that tribal zoning authority extends to non-Indians on fee land under the exception pertaining to consensual relationships. Non-Indians often acquire land directly from other fee owners or through inheritance without entering into any relationship with the tribe. *Montana*, which itself involved fee land, demonstrates that the acquisition of fee lands is not a sufficient basis on which to invoke the consensual relationship exception.

to protect tribal self-government." 450 U.S. at 564. To justify tribal regulation, the conduct of non-Indians must "imperil" the welfare of the tribe (*id.* at 566) or "threaten [its] political or economic security" (*ibid.*). This parsimonious language clearly belies the notion that inherent power includes the exercise of traditional police power over non-Indians residing on fee land in the open area.

Moreover, the *Montana* decision itself shows that the Court did not equate inherent authority with traditional police powers. Comparable police powers—the regulation of hunting and fishing by non-Indians—were at issue in *Montana*. The Court's holding that the tribe may not regulate such uses by non-Indians on fee lands precludes the similar claim in this case based on no more than inherent authority.[12] *See also United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (State, not tribe, has authority to regulate use of excess waters by non-Indians on fee land).

The standard enunciated by the Court in *Montana* envisions a close, careful scrutiny of the facts and the justification for the exercise of tribal authority in each case. It requires a precise evaluation of the extent to which non-Indian conduct on the reservation "threatens" or "imperils" the tribe. Because the Ninth Circuit misperceived the *Montana* standard as supporting tribal zoning authority as a matter of law, it disregarded altogether the findings of the district court with regard to

[12] The *Montana* Court suggested that if the State had "abdicated or abused its responsibility for protecting and managing wildlife," tribal regulation of hunting and fishing might be permitted. 450 U.S. at 566 n.16. That was not, however, true in *Montana*, nor is it true here. The record contains no suggestion that Yakima County has abused its zoning power. To the contrary, the district court found the County's zoning plan is *more* protective than the Yakima Nation's of the open area's agricultural lands. Pet. App. 53a.

the open area.[13] The district court specifically found that the proposed development in the open area does not threaten any food source for members of the Yakima Nation; that it will not significantly infringe upon religious or spiritual values of the Yakima Nation; that it does not threaten the unique role that land and natural resources play in tribal life; and that it does not diminish the Yakima Nation's political integrity. Pet. App. 53a-54a.

The very nature of the open area defeats any argument that County zoning would imperil or threaten the Yakima Nation. Almost half of the open area's 350,000 acres are owned in fee (Pet. App. 83a); and of the 25,000 residents, only 5,000 are tribal members. *Id.* at 84a. There are three incorporated towns (*id.* at 51a) and a variety of land uses, including rangeland, agriculture, and commercial and residential development. *Id.* at 40a. Although the record reflects that ninety percent of the Yakima Nation's income derives from the closed area (*id.* at 136a), there is no indication of any income derived from the open area.

The absence of any uniquely tribal qualities in the open area is highlighted by that area's reliance on county government. Yakima County provides extensive services, including a county-maintained road system and schools.

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[13] The flaw in the Ninth Circuit's analysis is obvious. From the *Montana* Court's use of the phrase "health or welfare of the tribe" (450 U.S. at 566), the Ninth Circuit derived the conclusion that the inherent authority of Indians over non-Indians extends to the exercise of traditional police powers: "Zoning, in particular, traditionally has been considered an appropriate exercise of the police power of a local government, precisely because it is designed to promote the health and welfare of its citizens." Pet. App. 21a-22a. Tnat the *Montana* Court never equated inherent tribal power with police power is evident in both the outcome and the language of the case.

It has exercised zoning jurisdiction since 1965 and has long been involved in other planning, development, and regulation of the area. Pet. App. 52a, 88a, 43a.[14]

In sum, the broad view taken by the Ninth Circuit of the inherent sovereignty of the Yakima Nation is unsupported by *Montana*, and it ignores the critical facts found by the district court concerning the virtually non-existent impact on the Yakima Nation of the County's regulation in the open area.

B. Due Process Concerns Require A Narrow Construction Of Tribal Authority Over Non-Indians.

The exercise of tribal jurisdiction over non-Indians on fee land raises serious due process concerns that require a narrow interpretation of Indian jurisdiction. Similar due process concerns were in the background of the Court's analysis in *Oliphant*, which denied the tribe criminal jurisdiction over non-Indians. 435 U.S. at 210. By limiting the reach of tribal authority, the Court was able to avoid addressing the due process questions that an interpretation authorizing Indian criminal jurisdiction over non-Indians would squarely have presented. A similarly narrow interpretation is required here.

The concerns about due process in this case revolve around the fundamental right to vote. Non-Indians have no voice in tribal governance. But it is elementary that those who govern must be politically accountable to those whom they govern. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which . . . we must live. Other rights, even the most basic, are illusory if the right

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[14] On these facts, the Yakima Nation might well have "accommodated itself" to the County's zoning authority. *See Montana*, 450 U.S. at 566. Indeed, the Yakima Nation itself has sought County approval of a long plat. Tr. 455.

to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Beginning with *Wesberry*, the Court has established the principle that citizens have the right to elect on an equal basis with all other citizens those who represent them. 376 U.S. at 17 (election of Members of the House of Representatives). *See Reynolds v. Sims*, 377 U.S. 533 (1964) (election of state representatives); *Avery v. Midland County*, 390 U.S. 474 (1968) (election of local government officials); *Hadley v. Junior College District*, 397 U.S. 50 (1970) (election of junior college district trustees).

Even more fundamental than the right to an equal vote is the right to vote itself. In *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), the Court held that participation in school district elections could not be conditioned upon owning or leasing taxable real property. "Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Id.* at 626-27. *See Cipriano v. City of Houma*, 395 U.S. 701 (1969) (invalidating law limiting to property taxpayers the right to vote in elections called to approve the issuance of utility bonds); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (invalidating restriction of the franchise to real property taxpayers); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating requirement of one-year residence in State and three-month residence in County as a condition of voting). In short, voting "is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

The denial of the right to vote on racial grounds is invidious discrimination explicitly forbidden by the Constitution. U.S. Const. Amend. XV, § 1; *City of Mobile v.*

Bolden, 446 U.S. 55 (1980). No law or scheme of federal, state, or local government with this intent or, at times, this effect would be tolerated. Yet the Ninth Circuit's rule authorizes such a scheme for tribal governments. Nonmembers of the tribe are barred from becoming members—and thus are barred from voting in tribal elections—solely on account of their race.[15] In Yakima County alone, 20,000 non-Indians would be left without a voice in the government—the Yakima Nation—that would most palpably and immediately touch their day-to-day concerns by defining the permissible uses of their property.

This case is readily distinguished from other contexts in which non-resident citizens who own property in a jurisdiction are not entitled to vote there. It works no deprivation of rights to enforce reasonable, nondiscriminatory residence requirements. The obstacle in this case results not from a routine administrative requirement or personal choice, but rather a unique and immutable exclusion based on race. We do not, of course, suggest that the remedy is to compel the tribe to admit nonmembers to membership or to allow them to vote. It is, rather, to adopt a narrow construction of tribal authority over non-Indians that will not raise these most serious questions. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490,

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[15] The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341, does not afford the right to participate in Indian elections to non-Indians who reside within the boundaries of a reservation. Accordingly, that Act does not protect the fundamental right to vote. *Cf. United States v. Mazurie*, 419 U.S. 544, 558 & n.12 (1975). Moreover, because tribal forums enjoy exclusive jurisdiction over civil actions brought to enforce the Act, the Act is, with the exception of habeas corpus, unenforceable in federal court. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Judicial review of tribal government action is effectively prevented. *See id.* at 80 (White, J., dissenting).

499-501 (1979)[16]; *see also Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

These prudential considerations are particularly apt in this case because the most exacting scrutiny is required for racial classifications or deprivations of fundamental rights. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (Stone, J., concurring). The constitutional defects are avoided, however, by an interpretation that the tribe lacks zoning authority over non-Indians residing on fee lands in the open area of the Reservation.

II. THE NINTH CIRCUIT'S JURISDICTIONAL SCHEME IS UNWORKABLE.

In remanding *Whiteside II*, the Ninth Circuit implied that the interests of the Yakima Nation might outweigh the County's and thus preclude county zoning authority over the open area of the Reservation. Recognizing the importance to governments of the power to impose zoning restrictions to protect the public health and welfare, and to implement the goals of zoning through comprehensive planning, the court held that the Yakima Nation's tribal interests were sufficiently weighty under *Montana* to allow it to zone non-Indian fee land. Pet. App. 20a. The court found, as to the open area of the Reservation, that it could not balance the tribal and county interests on the record before it, and so remanded the case to the district court.

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[16] *See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S.Ct. 1392, 1397 (1988):

> This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

As we argue in Part I, the court's reading of *Montana* was in error. The court committed further error in failing to appreciate that the reasons it gave for finding tribal authority—the importance of zoning and in particular comprehensive zoning—are not unique to the Yakima Nation. While recognizing the tribal interest in regulating to protect the public health and welfare, the court turned a blind eye to the County's interests.

The Ninth Circuit's suggestion that the County's authority to zone the open area depends on a balancing test (and, therefore, that the County's authority might be lacking as to some or all of the roughly 175,000 acres that are individually owned) would create a jurisdictional framework that is, from a practical standpoint, wholly unworkable. These cases would likely not have arisen but for differences between the County's and the Yakima Nation's zoning schemes. Except in the rare case of a jurisdictional dispute as a matter of principle, a struggle over jurisdiction will ordinarily result from divergent policies. Where the policies of separate governments clash, as they do in this case, one government will win and one will lose. Concurrent jurisdiction does not work where comprehensive jurisdiction is required. Nor does a case-by-case adjudication without any definite rules suffice where certainty is required. It is no answer to say that the County's and the tribe's interests must be "balanced."

More than 60 years ago, in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court recognized the power of local governments to use land use regulation "in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 73 (1976) (Powell, J., concurring). Land use regulation may legitimately attempt to produce a living environment that is "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26, 33 (1954).

See also Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Zoning is now regarded as "perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'" *Young*, 427 U.S. at 80 (Powell, J., concurring) (citation omitted). This Court's docket itself bears witness to the particular importance of zoning to local governments.[17]

The primacy of state and local governments in land use regulation has been repeatedly recognized under federal law. Some of the earliest federal land use and environmental regulations reflect the traditional role of local control.[18] Even modern federal legislation, which of necessity has been pervasive and detailed, preserves significant state and local government authority. A number of statutes expressly preserve the full range of local police powers.[19] Some require coordination and consultation with state officials[20]; others mandate a federal-state

[17] *E.g.*, *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

[18] *E.g.*, the Mining Act of 1872, 30 U.S.C. §§ 22 *et seq.*, at §§ 22, 26, 28, 43; the Organic Administration Act of 1897, 16 U.S.C. §§ 473-482, at § 480.

[19] *E.g.*, the Mineral Leasing Act Revision of 1960, 30 U.S.C. §§ 181 *et seq.*, at § 189; the Taylor Grazing Act, 43 U.S.C. § 315, at § 315n; the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784, at § 1712.

[20] *E.g.*, FLPMA, 43 U.S.C. §§ 1720, 1752(d); the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C.

partnership in achieving identified regulatory goals and allow States to carry out the substantive aspects[21]; still others allow the State to develop its own regulatory plan and require compliance even by federal activities once the plan has been approved.[22]

This Court has repeatedly recognized that, in the absence of specific preemption, state and local governments may apply their laws and regulations even to federally owned lands and activities conducted on them. *See, e.g., California Coastal Comm'n v. Granite Rock Co.*, 107 S.Ct. 1419 (1987); *Kleppe v. New Mexico*, 426 U.S. 529, 543-44 (1976); *McKelvey v. United States*, 260 U.S. 353, 359 (1922). There is no reason to impose greater restrictions on local authority as applied to lands within Indian reservations.

In fact, to a great extent, the use of the fee lands at issue in this case is unquestionably subject to state or local, and not tribal, jurisdiction. Hunting, fishing, and water rights are among the most important associated with land, and they are particularly significant in the Indian culture. See, *e.g.*, Pet. App. 116a, 131a. Nevertheless, as the Court held in *Montana*, state hunting and

§§ 5901-5920, at § 5919(e); the Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. §§ 201-209, at § 201(a)(2)(B); the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524, at § 1508(b); the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1336, at § 1331(a), (d).

[21] *E.g.*, the Clean Air Act, 42 U.S.C. §§ 7401-7642; 1972 and 1977 Amendments to the Clean Water Act, 33 U.S.C. §§ 1251-1376; the Safe Drinking Water Act, 42 U.S.C. § 300(f)-(j); the Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund"), 42 U.S.C. §§ 9601-9657; the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987.

[22] *E.g.*, the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464. The only exception to federal compliance under the Coastal Zone Act is in cases of national security. 16 U.S.C. § 1456(c); 1456(d).

fishing laws are not, as a general rule, preempted by tribal sovereign authority with respect to the activities of non-Indians on lands owned in fee. 450 U.S. at 563-566. Similarly, the Ninth Circuit has held that the State, and not the tribe, has authority to regulate the use of excess waters by non-Indians on fee lands. *United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984).

To give the Yakima Nation zoning authority over the lands in question here would create an unmanageable jurisdictional patchwork. Effective zoning regulation requires comprehensive planning authority. Comprehensive planning allows a county to accommodate the competing interests of all its citizens. As the court of appeals itself recognized, "a major goal of zoning is the 'systematic and coordinated utilization of land' in a particular area." Pet. App. 23a, *quoting* N. Williams, *American Land Planning Law* § 1.06 (1974); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983). Dividing zoning jurisdiction between the County and the Yakima Nation would subvert the County's authority not only by countermanding the County's decisions about permitted and prohibited uses, but also by interfering with the County's comprehensive plan.

Here, for example, Yakima County's general rural district "is intended to 'provide protection for the county's unique resources and land base;' 'minimize scattered rural developments . . . by encouraging clustered development;' and 'permit only those uses which are compatible with [the] rural character.'" Pet. App. 45a; see also *id.* at 52a. If the Yakima Nation's restrictions are applied to preclude the proposed development in the place where the County has determined that it would best be located, such development may have to be located elsewhere, where it might not suit the County's comprehensive plan.[23] By

[23] On the facts of this case, the uses allowed by tribal regulation in the closed area are so limited that we do not believe that the County's interests would be seriously threatened even if it did not exercise authority there.

way of further illustration, the district court found that the Yakima Nation's small minimum lot size requirements rendered its zoning scheme less protective than the County's in the open area's agricultural lands. Pet. App. 53a. If it had zoning authority, the Yakima Nation might permit a use that would be contrary to the County's comprehensive plan. Such a use might also have spillover effects that do not observe the boundaries of the Reservation. Regulation by the Yakima Nation thus could thwart the County's policies even with respect to lands off the Reservation.

The decision of the Ninth Circuit, therefore, is not only contrary to federal law and policy, as interpreted by this Court, but would also create a system of jurisdictional conflicts that would undermine the established purposes of land use regulation.

CONCLUSION

The judgment of the court of appeals should be reversed, and the judgment of the district court reinstated, in *Whiteside II*.

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IN THE

Supreme Court of the United States

October Term, 1988

PHILIP BRENDALE,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, et al.,
Respondents.

STANLEY WILKINSON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, et al.,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE TOWN OF PARKER, ARIZONA

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1588

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	2
PARTIES SUPPORTED	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE DECISION OF THE NINTH CIRCUIT SHOULD BE REVERSED	3
II. REGARDLESS OF THE OUTCOME OF THE PENDING CASES, FEE LOTS IN THE TOWN OF PARKER SHOULD NOT BE SUBJECT TO TRIBAL REGULATORY JURISDICTION	7
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
CASES:	
Arizona v. California, 373 U.S. 546 (1963)	5
Colorado River Indian Tribes v. Town of Parker, No. CIV 83-2359-PHX-RGS (D. Ariz.)	2, 8
Colorado River Indian Tribes v. Town of Parker, 776 F.2d 846 (9th Cir. 1985)	2
Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987)	2, 4, 6, 7
Fisher v. District Court, 424 U.S. 382 (1976)	5
Montana v. United States, 450 U.S. 544 (1981)	3, 4, 5, 6, 10
Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906)	5
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	7
Talton v. Mayes, 163 U.S. 376 (1896)	6
Thomas v. Gay, 169 U.S. 264 (1898)	5
United States v. New Mexico, 438 U.S. 696 (1978)	6
Williams v. Lee, 358 U.S. 217 (1959)	5
Yakima Indian Nation v. Whiteside, 617 F.Supp. 735 (E.D. Wash. 1985)	4, 7
Yakima Indian Nation v. Whiteside, 617 F.Supp. 750 (E.D. Wash. 1985)	4, 7
CONSTITUTIONAL PROVISIONS AND STATUTES:	
Bill of Rights	6
Fourteenth Amendment	6
25 U.S.C. §§ 1301-1303	7
24 Stat. 388	8
32 Stat. 388	8
33 Stat. 224	8
35 Stat. 77	9
MISCELLANEOUS:	
Rule 36, Rules of the Supreme Court of the United States	2

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE TOWN OF PARKER, ARIZONA

INTEREST OF AMICUS CURIAE

The amicus curiae Town of Parker, an incorporated municipality under Arizona law which is located within the exterior boundaries of the Colorado River Indian Reservation, is a defendant in litigation pending in the United States District Court for the District of Arizona. *Colorado River Indian Tribes v. Town of Parker*, No. CIV 83-2359-PHX-RGS. *See also Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846 (9th Cir. 1985) (interlocutory appeal by Tribes of preliminary injunction relating to tribal ordinance regulating liquor).[1] One of the primary issues in the litigation is whether all or a portion of the townsite has been disestablished from the Colorado River Indian Reservation. District Court Docket Nos. 87, 109, 144, 156; 776 F.2d at 848. Unless it is determined that the fee-patented lands in the townsite have been disestablished from the reservation, questions will naturally arise regarding the nature and extent of municipal and tribal regulatory authority over those lands. Thus, this Court's decision in the cases now before it could have a substantial impact upon the Town of Parker.

PARTIES SUPPORTED

Amicus curiae Town of Parker supports the position taken by petitioners in this Court that the decision of the Ninth Circuit Court of Appeals relating to the "open area" involved in *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987), should be reversed.

SUMMARY OF ARGUMENT

As its primary position, this amicus curiae urges the Court to hold that Indian tribes lack civil regulatory authority over fee patented

[1]Because the Town of Parker is a political subdivision of the State of Arizona and this brief is sponsored by the authorized law officer of the town, consent to the filing of this brief was neither sought nor required under Rule 36, Rules of the Supreme Court of the United States.

lands located within the geographic boundaries of an Indian reservation unless activities on those lands so significantly impair the use and enjoyment of the trust lands that they threaten to defeat the entire purpose of the reservation. The second section of this amicus brief explains that regardless of the outcome of the pending cases, fee lots in the Town of Parker should not be subject to tribal regulatory jurisdiction.

ARGUMENT

I.

THE DECISION OF THE NINTH CIRCUIT SHOULD BE REVERSED.

The very limited nature of tribal authority over nonmembers was emphasized by this Court in *Montana v. United States*, 450 U.S. 544 (1981). Because "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes," it "cannot survive without express congressional delegation." *Id.* at 564. As a general proposition, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565.

In *Montana* the Court recognized two narrow exceptions to the general absence of tribal regulatory authority over nonmembers on an Indian reservation. First, a tribe retains the authority to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Implicit in this first exception is a recognition that it is generally appropriate for the level of tribal civil jurisdiction over lessees, licensees and their invitees to be a matter of private contract between the parties. If a tribe's demands are unacceptable, a nonmember can avoid tribal jurisdiction

by the simple expedient of foregoing the consensual relationship and staying off the reservation.[2]

According to the second exception recognized in *Montana*:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566 (the "tribal interest" test). Reasoning that zoning is an appropriate exercise of the police power because "it is designed to promote the health and welfare of its citizens," the Ninth Circuit concluded in the cases now before this Court that tribes are entitled to regulate fee land owned by non-Indians. 828 F.2d at 534-35. Under the Ninth Circuit's interpretation of *Montana*, tribes presumably have authority to subject fee lands to the full panoply of police powers, from business regulation to eminent domain to health and safety ordinances, subject only to a determination in a particular case that a tribe's interests in imposing its own laws on fee lands are outweighed by a local government's interests. *See* 828 F.2d at 535-36.

By recognizing a broad tribal authority to exercise "police powers" on fee lands within Indian reservations, the Ninth Circuit has expanded tribal jurisdiction so far beyond the boundaries established by this Court in *Montana* that the exceptions supplant the general rule. The very narrow scope of the "tribal interest" exception intended by *Montana* is confirmed by the manner in which it was applied in that case. First, the Court noted the absence of evidence suggesting that non-Indian hunting and fishing on fee lands "so threaten the Tribe's political or economic security as to justify tribal regulation." 450 U.S. at 566. No one alleged that non-Indian hunting and fishing on fee lands "imperil the subsistence or welfare of the

[2]In the cases before this Court, the district court recognized that the "consensual relationship" exception is not applicable to tribal regulation of fee land. *See* 617 F.Supp. at 743, 757. The Ninth Circuit's opinion did not address that issue.

Tribe." *Id.* The State of Montana's statutory and regulatory scheme did not "prevent the Crow Tribe from limiting or forbidding non-Indian hunting and fishing" on reservation trust lands. *Id.* at 566-67.

An examination of the cases cited in *Montana* as support for the "tribal interest" test also reveals the very limited circumstances in which the exception applies. *Fisher v. District Court*, 424 U.S. 382 (1976), held that because state court jurisdiction over an adoption proceeding involving only tribal members "would interfere with the powers of [tribal] self-government," the tribal court had exclusive jurisdiction. *Id.* at 387. *Williams v. Lee*, 358 U.S. 217 (1959), rejected state court jurisdiction over a suit by a non-Indian licensee to collect for goods sold to tribal members on the reservation, describing the issue as being whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. *Id.* at 220.[3]

The issue in *Thomas v. Gay*, 169 U.S. 264 (1898), and *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906), two other cases relied upon in *Montana*, was whether cattle owned by non-Indian residents of a reservation and permitted to graze on the reservation share the immunity from state taxation enjoyed by property of Indians. Despite an argument that the state tax violated the rights of the Indians because it reduced the amount of tribal revenue and the value of tribal lands, the Court upheld the state's interest in raising revenue from state residents.

In an important footnote, the Court stated in *Montana* that as a corollary to the "tribal interest" test, the Court has held that "Indian tribes retain rights to river waters necessary to make their reservations livable." 450 U.S. at 566 n.15 (citing *Arizona v. California*, 373 U.S. 546 (1963)). Ten years ago this Court reiterated that there is an implied reservation of water only if "without the water the purposes

[3]The state had no interest in asserting jurisdiction over the transaction, which involved no off-reservation activities.

of the reservation would be entirely defeated." *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

These cases indicate that the proper interpretation of the "tribal interest" test of *Montana* is that Indian tribes retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within reservation boundaries only if the conduct so significantly impairs the use and enjoyment of the trust lands that it threatens to defeat the entire purpose of the reservation. This interpretation of the "tribal interest" test implements the general principle that Indian tribes lack sovereign power over the activities of nonmembers except to the extent "necessary to protect tribal self-government or to control internal relations . . . ." 450 U.S. at 564. At the same time, this approach ameliorates two serious consequences of the Ninth Circuit's decision in the pending cases: frequent litigation and regulation without representation or remedy.

If allowed to stand, the Ninth Circuit's interpretation of *Montana* would foster a virtually unlimited series of lawsuits between Indian tribes, local governments and owners of fee lands on reservations in western states regarding the proper outcome of the balancing process. The human imagination is essentially the only limitation on the variety of instances in which the scope of respective rights could be questioned and litigated. By properly limiting tribal regulation of fee lands to instances where it is necessary to prevent fundamental adverse effects that threaten the purpose of a reservation, this Court would give lower courts and potential litigants a clear signal that in most instances tribes lack authority to regulate fee lands.

The Ninth Circuit's unwarranted expansion of *Montana* also promotes regulation without representation or remedy. Nonmembers cannot vote in tribal elections or serve on tribal councils. Thus, they have no voice in the decisions made by tribal regulators. Moreover, tribal governments are not bound by the limitations imposed by the Bill of Rights or the Fourteenth Amendment, *Talton v. Mayes*, 163 U.S. 376 (1896), and, with the exception of writs of habeas corpus in criminal cases, are immune from suit for violations of the Indian Civil

Rights Act, 25 U.S.C. §§ 1301-1303. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Under these circumstances, tribal regulation of fee owners should be carefully limited to situations where it is necessary to protect the purpose for which a reservation was created.

Applied to the facts of the pending cases, the "defeated purpose" test would uphold the decisions of the district court. In *Yakima Indian Nation v. Whiteside*, 617 F.Supp. 735 (E.D. Wash. 1985), the district court found that the proposed housing development "places critical assets of the Closed Area in jeopardy" and is a "danger to the economically important timber production," 617 F.Supp. at 744, from which ninety percent of the annual tribal income is derived. *Id.* at 742. In the companion case, however, the district court found that the proposed project in the "open area" "does not threaten a food source" of tribal members or "the economic security of the Yakima Nation," and it will not significantly infringe uses of lands having "unique religious or spiritual significance" to tribal members. *Yakima Indian Nation v. Whiteside*, 617 F.Supp. 750, 755 (E.D. Wash. 1985).

II.

REGARDLESS OF THE OUTCOME OF THE PENDING CASFS, FEE LOTS IN THE TOWN OF PARKER SHOULD NOT BE SUBJECT TO TRIBAL REGULATORY JURISDICTION.

Even if this Court decides to affirm the judgment of the Ninth Circuit, we contend that the situation involving this amicus curiae is sufficiently different than the cases now before the Court that, regardless of the outcome in those cases, fee lots in the Town of Parker should not be subject to tribal regulatory jurisdiction. In the first place, the pending cases do not involve the question of tribal zoning authority in incorporated municipalities; the Ninth Circuit expressly noted that apparently "neither Yakima Nation nor the County regulates land use within the incorporated towns." 828 F.2d at 531. In addition, the Parker townsite was created with the understanding and intention that it would not be subject to tribal

jurisdiction. Non-Indian settlers purchased lots in the townsite and established homes and businesses in reliance upon that expectation. For more than seventy years, county and municipal governments exercised exclusive jurisdiction over the lots in town without any interference from the tribes. Accordingly, we urge the Court to utilize particular care in describing the nature and scope of tribal authority over fee lands located within Indian reservations.

The following summary of facts relating to this amicus curiae is derived from the hundreds of documents, report of expert witness Lawrence C. Kelly, and other materials filed in federal district court in December 1987 as part of the Town of Parker's opposition to a motion for summary judgment filed by the Colorado River Indian Tribes. The court has not yet issued its decision.[4]

The land which now comprises the Parker townsite was added to the Colorado River Indian Reservation by an executive order in 1874. Following the passage of the General Allotment Act, 24 Stat. 388, in 1887 and the Reclamation Act, 32 Stat. 388, in 1902, potentially irrigable reservation lands along the Colorado River became the target of developers and other non-Indians. Prompted by these factors and the destitute condition of the Indians living on the reservation, Congress enacted legislation in 1904 authorizing allotment of small parcels of reservation lands to individual Indians and sale of the remainder to non-Indian settlers under the provisions of the Reclamation Act. 33 Stat. 224.

Meanwhile, the Arizona and California Railroad decided to ford the Colorado River near the location where Parker is now situated. The railroad lobbied for creation of a town where railroad employees could establish residences without trespassing on the reservation and

[4]As stated previously, one of the primary issues in the litigation is whether all or a portion of the Parker townsite was disestablished from the Colorado River Indian Reservation. If the fee lands in town are determined to be part of the reservation, much of the evidence relating to the disestablishment issue would be relevant in determining the scope of any tribal authority over those fee lands.

without securing a residence permit — *i.e.*, without being subject to tribal jurisdiction. Congress acted in 1908, appropriating money to enable the Secretary of the Interior to reserve and set apart lands for townsite purposes, and to survey, plat and sell the tracts. 35 Stat. 77. The federal government subsequently established a townsite of approximately one square mile in the northern portion of the reservation. The report of expert witness Lawrence Kelly concludes that the Parker townsite was established at the urging of non-Indians for the use of non-Indians, with the federal government expressly recognizing that the Parker townsite land was not needed by any Indians. The federal government also stated that the townsite lands would be "in the hands of white people," and determined that residence permits and traders' licenses were no longer required in relation to Parker townsite lands.

The federal government began selling Parker lots in 1910, issuing fee patents to the purchasers. Approximately two-thirds of the lots in Parker are now privately owned, while the remainder are owned by the United States. No additional sales have been permitted since approximately 1930. As of 1980 nearly ninety percent of the 2,542 inhabitants of the town were non-Indians. Similarly, more than ninety percent of the occupied housing units are occupied by non-Indians.

For approximately seventy years, county and municipal governments exercised exclusive jurisdiction over all of the lots in the town without any interference from the tribes. The tribes, themselves, expressly and repeatedly disclaimed jurisdiction over activities in the townsite during that period of time. The federal government also expressly recognized the exclusive civil jurisdiction of county and municipal governments in the Parker townsite. Beginning in 1910, for example, the federal government repeatedly advised applicants for franchises for the installation of the water system, water and lighting system and electric light and power and gas system, all in the townsite of Parker, that the United States no longer had jurisdiction or control over such matters, that the townsite had been dedicated to the public, that the town would have control over such matters when

it was incorporated, and that until such time, control would be with the county authorities under Arizona law. As in *Montana,* the tribes have "traditionally accommodated" themselves to "'near exclusive' regulation" of activities within the townsite. 450 U.S. at 566.

The longstanding exercise of exclusive jurisdiction in Parker by the county and municipal governments offers strong evidence that even if Parker has not been disestablished from the Indian reservation, activities on fee lands in the townsite do not threaten or significantly affect "the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. Just as the Crow Tribe lacks authority under *Montana* to regulate non-Indian hunting and fishing on fee lands within its reservation, the Colorado River Indian Tribes' "inherent sovereignty" would not entitle them to apply their zoning ordinance, building code or other forms of civil jurisdiction to fee lands in the Parker townsite.

CONCLUSION

If the Ninth Circuit's interpretation of *Montana* is not rejected, non-Indian owners of fee lands in reservations will be subject to extensive regulation by a government in which they have no voice and which is immune from suit for violations of most of the basic constitutional protections. Rather than permitting the narrow *Montana* exceptions to tribal jurisdiction over fee lands to swallow the general rule prohibiting tribal regulation, we urge the Court to reverse the Ninth Circuit to firmly make clear that tribal regulation of fee lands is limited to the rare instances when it is necessary to prevent fundamental adverse effects that threaten the purpose of a reservation. In addition, regardless of how *Montana* is clarified and

applied in the pending cases, fee lots in the Town of Parker should not be subject to tribal regulatory jurisdiction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR MENDOCINO COUNTY, CALIFORNIA; BECKER COUNTY AND MAHNOMEN COUNTY, MINNESOTA; LAKE COUNTY, ROOSEVELT COUNTY AND SANDERS COUNTY, MONTANA; THURSTON COUNTY, NEBRASKA; MOUNTRAIL COUNTY, MCLEAN COUNTY AND WARD COUNTY, NORTH DAKOTA; TODD COUNTY AND ZIEBACH COUNTY, SOUTH DAKOTA; DUCHESNE COUNTY AND UINTAH COUNTY, UTAH; FREMONT COUNTY, WYOMING; AND WASHINGTON STATE ASSOCIATION OF COUNTIES, WASHINGTON, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

(Counsel Listed on Inside Cover)

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THIS COURT HAS ESTABLISHED CLEAR PRINCIPLES FOR DECIDING QUESTIONS OF TRIBAL CIVIL JURISDICTION OVER NON-MEMBERS ON FEE LANDS	7
A. In *Oliphant* This Court Set Forth Precedent And Presumptions That Are Controlling Here	7
1. Precedent	7
2. Presumptions	10
B. In *Montana* This Court Reaffirmed The Precedent And Further Delineated The Principles That Are Controlling Here	11
1. Precedent	11
2. The Exception	14
C. Nothing In *National Farmers Union* Or *Iowa Mutual* Detracts From The Clear Principles Established In *Oliphant* And *Montana*	19
1. *National Farmers Union*	19
2. *Iowa Mutual*	22
D. The Treaty Arguments Of The Yakima Tribe Were Correctly Rejected In Both *Oliphant* And *Montana*	24
II. THE LEGISLATIVE HISTORY OF THE GENERAL ALLOTMENT ACT CONFIRMS CONGRESS NEVER INTENDED INDIAN TRIBES TO HAVE CIVIL JURISDICTION OVER NON-MEMBERS ON FEE LANDS	25

TABLE OF CONTENTS—(Continued)

	Page
CONCLUSION	30
APPENDICES:	
A. Excerpt from S. Rep. No. 2738, 58th Cong., 3d Sess. (1904)	1a
B. Excerpt from the Legislative History of the General Allotment Act submitted in the *Brief for Amici Curiae State of Minnesota et al.*, at 17-22, in *Montana v. United States*, 450 U.S. 544 (1981)	7a

TABLE OF AUTHORITIES

CASES	Page
Arizona v. California, 373 U.S. 546 (1963)	14
Buster, et al. v. Wright, et al., 135 F.2d 947 (8th Cir. 1905), app. dismissed, 203 U.S. 599 (1906)	22
Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (1987)	*passim*
DeCoteau v. District County Court, 420 U.S. 425 (1975)	29
Donnelly v. United States, 228 U.S. 243 (1913)	15
Draper v. United States, 164 U.S. 240 (1896)	13, 30
Felix v. Patrick, 145 U.S. 317 (1892)	15
Fisher v. District Court, 424 U.S. 382 (1976)	14, 18, 19, 23, 24
Fletcher v. Peck, 6 Cranch 87 (1810)	9
Harrison v. Laveen, 67 Ariz. 337, 196 Pac.2d 456 (1948)	15
Holly v. Totus, No. 85-4436, *cert. denied*, 94 L.Ed. 2d 47 (1987)	27
Iowa Mutual Insurance Co. v. LaPlante, 107 S.Ct. 971 (1987)	20, 22, 23
Johnson v. McIntosh, 8 Wheat. 543 (1823)	9
The Kansas Indians, 5 Wall. 737 (1866)	16, 17
Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (1982)	3
Langford v. Monteith, 102 U.S. 145 (1880)	11
Maricopa and P. Railroad Co. v. Arizona, 156 U.S. 347 (1895)	17
Mattz v. Arnett, 412 U.S. 481 (1973)	29
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)	12, 15, 18
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)	12
Montana v. United States, 450 U.S. 544 (1981)	*passim*
Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906)	14, 16, 17, 18, 19
Morris v. Hitchcock, 194 U.S. 384 (1904)	22
National Farmers Union Insurance Cos. v. Crow Tribe of Indians et al., 471 U.S. 845 (1985)	6, 19, 20, 21, 22

TABLE OF AUTHORITIES—Continued

	Page
New Mexico v. Mescalero Tribe, 462 U.S. 324 (1983)	14
New York ex rel. Ray v. Martin, 326 U.S. 496 (1946)	11, 15
Northern Pacific Railroad Co. v. United States, 227 U.S. 544 (1913)	27
Oliphant v. Schlie, 544 F.2d 1007 (1976)	24
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	*passim*
Organized Village of Kake v. Egan, 369 U.S. 60 (1962)	13, 30
Puyallup Tribe v. Washington Game Depart., 433 U.S. 165 (1977)	12, 13, 25, 26, 29
Rosebud Sioux Tribe v. Kneip, et al., 430 U.S. 584 (1977)	29
Solem v. Bartlett, 465 U.S. 463 (1984)	3, 29
Surplus Trading Co. v. Cook, 281 U.S. 647 (1930)	11
Thomas v. Gay, 169 U.S. 264 (1898)	14, 17, 18, 19
United States v. Candelaria, 271 U.S. 432 (1926)	15
United States v. Kagama, 118 U.S. 375 (1886)	12
United States v. Mitchell, 445 U.S. 535 (1980)	29
United States v. Mitchell, 463 U.S. 206 (1983)	29
United States v. Montana, 604 F.2d 1162 (9th Cir. 1979)	28
United States v. Payne, 264 U.S. 446 (1924)	27
United States v. Pelican, 232 U.S. 442 (1914)	27
United States v. Quiver, 241 U.S. 602 (1916)	11
United States v. Rickert, 188 U.S. 432 (1903)	17
United States v. Rogers, 4 How. 567 (1846)	9
United States v. Solomon, 753 F.2d 1522 (1985)	27
United States v. Sutton, 215 U.S. 200 (1909)	27
United States v. Wheeler, 435 U.S. 313 (1978)	12
United States v. Winans, 198 U.S. 371 (1905)	27
Utah and Northern Railway Company v. Fisher, 116 U.S. 28 (1885)	15, 17
Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 107 U.S. 596 (1986)	2, 3

TABLE OF AUTHORITIES—Continued

	Page
Wagoner v. Evans, 170 U.S. 588 (1898)	17, 18
Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980)	18, 19, 23, 24, 30
Washington v. Yakima Nation, 439 U.S. 463 (1979)	27
Williams v. Lee, 358 U.S. 217 (1959)	12, 14, 15, 18, 19
Williams v. United States, 327 U.S. 711 (1946)	15
Yakima v. Whiteside, 828 F.2d 529 (9th Cir. 1987)	*passim*
STATUTES AND TREATIES	
4 Stat. 729, 735 (1834)	16
33 Stat. 595	
Treaty with the Yakimas, 1855, 12 Stat. 951	7
General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.*	26, 27, 28, 29, 30
43 U.S.C. §§ 1195-97	26
1934 Wheeler Howard Act, 48 Stat. 987, 25 U.S.C. §§ 476-77	16
CONGRESSIONAL REFERENCES	
S. Rep. No. 2738, 58th Cong., 3d Sess. 1 (1904)	27
OTHER AUTHORITIES	
2 Op. Atty. Gen. 693 (1834)	10, 21
7 Op. Atty. Gen. 174 (1855)	10, 21
F. Cohen, *Handbook of Federal Indian Law* (1982 ed.)	22
Pfaller, *James McLaughlin, The Man with the Indian Heart* (1978)	27
Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right of Congressional License?* 51 Notre Dame Law 600 (1976)	24

INTEREST OF AMICI CURIAE

On August 9, 1988, at the annual meeting of the National Association of Counties, a Resolution was passed in recognition of the importance of this case as it relates directly to county governments. That Resolution provides in pertinent part:

> WHEREAS, in 1985 the Public Lands Steering committee adopted a resolution in recognition of the complicated relationships between tribal and county governments caused by the unique legal status of Native Americans under federal law, treaties and court decisions; and
>
> WHEREAS, this same resolution also recognized the need for individual counties to join together to address issues of mutual concern in order to conserve scarce resources and increase their effectiveness; and
>
> WHEREAS, the United States Supreme Court recently agreed to decide the case of the Yakima Indian Nation, which case involves tribal jurisdiction over non-members; and
>
> WHEREAS, the Attorneys General of Arizona, Nevada, New Mexico, South Dakota, Utah, Washington, and Wyoming have stated that the precedent in this case, if not reversed, will result in even more claims of preemption by tribal governments of state and local governmental powers over non members, not just in the area of zoning, but in broader uses such as environmental controls, taxation, and general business regulation, and . . .
>
> WHEREAS, individual units of local government cannot effectively be heard in an effective manner due to an insufficiency of local resources; now, therefore
>
> BE IT RESOLVED, that the Public Lands Steering Committee request individual units of local government collectively support and fund a joint effort in the support, briefing, argument and related aspects of this case before the United States Supreme Court, and

BE IT RESOLVED, that the Public Lands Steering Committee commends those Attorneys General that have filed in support of the petitioner and further urges those Attorneys General to devote additional staff, time, and resources in support of Yakima County.

The concern that prompted the Resolution can be simply stated. Tribal governments across the United States have enacted hundreds of ordinances claiming varying degrees of civil jurisdiction over non-Indians on fee lands. Almost without exception, these tribal ordinances are premised on some aspect of the political integrity, economic security or the health or general welfare of tribal government. In effect, tribal advocates have pushed a misreading of this Court's *Montana* decision beyond belief. To date, these tribal actions promise the most extensive litigation ever experienced by these units of local government—at a time when county governments can ill afford to squander scarce resources on senseless litigation. There is no question that the primary impact of shifts in federal Indian policy, from whatever source, falls squarely on units of local government, and this problem is pronounced.

The counties joining in this Brief all contain areas that were at one time established as Indian reservations. They are representative of many other counties similarly situated throughout the United States. The history of each area is, of course, as varied and diverse as federal Indian policy—with one exception. Historically, no tribal court here has ever been recognized by anyone to have tribal civil jurisdiction over non-Indians or fee lands. Historically, such a procedure would have uniformly been viewed as novel and unusual, and certainly inconsistent with prior practice and experience.

To be sure, the extent of the experience of each *amici* with Indian reservations reflects radically differing fact situations. For example, it was not until 1985, that the Tenth Circuit Court of Appeals resurrected the boun-

daries of the original Uncompahgre Reservation and the original Uintah Reservation so as to encompass most of Duchesne County and Uintah County, Utah. *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 107 U.S. 596 (Dec. 1, 1986). Before that time, the lands constituting the Ute Tribe's Reservation were considered to be only those lands held in trust by the federal government (more than 1,000,000 acres). Now the second largest Indian reservation in the United States, the entire region is 90% non-Indian and 3,000,000 acres of the territory are non-Indian owned. Although the United States agrees that the Uncompahgre Reservation ceased to exist a century ago, the disestablishment issue is still in litigation in state court. The Tribal Law and Order Code contains more than 600 sections in 162 pages of closely printed type and asserts detailed authority over all persons living or traveling within the boundaries of its Reservation, wherever those boundaries may be. The Ute Tribe has the power, according to its Code, to exclude and remove "persons" from the Reservation who threaten "the peace, health, safety, morals and general welfare of the Tribe," if necessary even without a hearing before the Tribal Court (§§ 3-1-3, 3-1-4).

In 1982, Fremont County, Wyoming, was informed that the power to control use of non-Indian owned land within the Wind River Reservation simply "flows from the inherent sovereign right" of Indian tribes. *Knight v. Shoshone and Arapaho Indian Tribes*, 670 F.2d 900, 903 (1982). On a record that was clearly deficient, this pronouncement was received with uniform disbelief. *Id.* Over two-thirds of the population in Fremont County within the original reservation is non-Indian and 83% of the land is non-Indian owned.

Ziebach County, South Dakota, entirely within the Cheyenne River Indian Reservation as a result of this Court's opinion in *Solem v. Bartlett*, 465 U.S. 463 (1984), has since found out that even tribal constitu-

tions do not necessarily set the limits of this new tribal civil jurisdiction over non-Indians. The Cheyenne River Sioux Tribe recently instituted several measures that assert tribal civil jurisdiction over non-Indians on fee lands, in spite of an express prohibition in their tribal constitution.

In Mendocino County, California, the resurrection of a rancheria with "Indian Country" status has been judicially recognized, primarily as a result of a recent stipulation by an Assistant United States Attorney. The governing board of the rancheria immediately imposed a zoning moratorium on the non-member residents of the area on fee lands, in the first of what promises to become a more typical situation for counties in the State of California.

Other *amici* share the distinction of having faced sporadic litigation for years. The original 1867 White Earth Reservation encompassed parts of Becker County and Mahnomen County, where a substantial majority of residents are non-Indians and 90% of the land is non-Indian owned. In the last two decades these counties have been defendants in numerous lawsuits including tribal claims of exclusive hunting and fishing jurisdiction, land claims, boundary claims, and related issues. The attempts of the counties to serve their residents and resolve even such mundane matters as rural garbage disposal routinely meet with tribal resistance.

And the list goes on. Lake County and Sanders County, Montana, and the Flathead Reservation; Roosevelt County, Montana, and the Fort Peck Reservation; Thurston County, Nebraska, and the Omaha and Winnebago Reservations; Mountrail County, McLean County and Ward County, North Dakota, and the Fort Berthold Reservation; and Todd County, South Dakota, and the Rosebud Reservation—litigation on reservation boundaries, litigation on land claims, and the list goes on. Cooperative agreements have resolved some of the legitimate

questions and in the future, similar agreements can also hopefully serve this purpose. But the addition of tribal zoning and tribal taxation and so forth, to this list, serves no legitimate purpose.

Significantly, in most of these Indian reservations, and others, non-Indian population and non-Indian fee ownership figures at least meet or exceed those of the Indian tribe. County government in these same areas is not some new and novel experience. It has been there for decades pursuant to congressional policy. That policy never contemplated Indian tribes with civil jurisdiction over non-Indians on fee lands. This Court in this case should restate *Montana* and set that policy forth in no uncertain terms. *Amici* recognize the need for cooperative effort to facilitate legitimate federal policy on Indian reservations, but no one needs to have this new litigation dominate the agenda of local government for the last decade of the twentieth century.

SUMMARY OF ARGUMENT

The Court of Appeals was quick to criticize this Court four times in the opinion below. According to the Court of Appeals, the recent "tests" formulated by this Court to resolve the issue here (tribal civil jurisdiction over non-Indians on fee lands) are "without apparent consistency", "disregarded" by the Court itself, and rife with "conflicting language". *Yakima Indian Nation v. Whiteside*, 828 F.2d 529 at 533, 534 n.1 (9th Cir. 1987). *Amici* do not agree. The controlling law in this case is clear.

In *Oliphant* and *Montana* this Court reiterates basic principles. And had the Court of Appeals paid more than mere lip service to the substance of those opinions, these cases would not be here.

Amici recognize that *Oliphant* and *Montana* do not automatically preclude Indian tribes from exercising civil jurisdiction over non-members on fee land in every imag-

inable situation. Detailed study of relevant statutes, Executive Branch policies, treaties, administrative and judicial decisions, as well as the sovereign aspects of the issue, are undeniably an appropriate endeavor for all courts presented with the question. *National Farmers Union Insurance Cos. v. Crow Tribe of Indians et al.*, 471 U.S. 845, 855-56 (1985). But once revisited, the carefully delineated principles set forth in *Oliphant* and *Montana*, we submit, authoritatively resolve the issue. Simply stated, *Oliphant* and *Montana* attest that absent affirmative delegation by Congress, Indian tribes do not have civil jurisdiction over non-members on fee lands. Such a power is inconsistent with their dependent status, and can not survive without express congressional delegation. Because the Yakima Nation cannot demonstrate this affirmative or express congressional delegation, the analysis of the Court of Appeals is as fundamentally flawed here as it was in the Court of Appeals' decisions in *Oliphant* and *Montana*.

Nor is there a need for this Court to depart from the contours of the doctrine this Court set forth in *Oliphant* and *Montana*. In this instance, as in other areas of federal Indian law, a coherent doctrine by which to measure, with some predictability, the scope of tribal jurisdiction over non-Indians is sorely needed. *Oliphant* and *Montana* have established that doctrine. All that remains to be done is to underscore and restate this well defined body of principles. Principles are essential here, to end the case by case tribal civil jurisdiction litigation which otherwise promises to plague this area of the law for years.

To be sure, the most sophisticated arguments will be submitted to advance the tribal cause. In *Oliphant*, the *Brief for the United States* stands as a work of art. And one can also expect a plethora of policy considerations in support of the tribal position. But the conclusion

of this Court in *Oliphant* and *Montana*,[1] based on established precedent and principles, should lead this Court to the same result here—and the policy considerations are still for Congress to weigh.

ARGUMENT

> [Mr. Justice Rehnquist] "QUESTION: Mr. Ernstoff, is there any way of distinguishing your case from a civil jurisdiction of the Tribe so that the Court could, in a principled way, say there was criminal jurisdiction here but not civil jurisdiction?
>
> MR. ERNSTOFF: That is a very interesting question, Your Honor. I really do not know that they can, to be honest with you, I have been trying to do that because I thought it would be of benefit to me to come in with the most narrow case that I can possibly come in with.
>
> To be intellectually honest, I do not think you really can and I do not think that you should."

Tr. of Oral Argument, at 53-54, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

I. THIS COURT HAS ESTABLISHED CLEAR PRINCIPLES FOR DECIDING QUESTIONS OF TRIBAL CIVIL JURISDICTION OVER NON-MEMBERS ON FEE LANDS.

A. In *Oliphant* This Court Set Forth Precedent And Presumptions That Are Controlling Here.

1. *Precedent.*

The central principle in *Oliphant* was succinctly stated; "An examination of our earlier *precedents* satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power

---

[1] "I agree with the Court's resolution of the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by non-members of the Tribe." *Montana*, 450 U.S. at 581 n.18 (Blackmun, J. dissenting in part; Brennan and Marshall, JJ., joining).

by Congress." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (emphasis added). In terms of civil jurisdiction these *precedents* are equally persuasive here, and the absense of affirmative delegation by Congress is therefore similarly controlling. *Oliphant* repeatedly stressed that the Suquamish Tribe did not contend that its jurisdiction stemmed from affirmative congressional authority or treaty provisions. *Id.* at 195-96, 198. The claim of the Yakimas suffers from the same fundamental defect. *Yakima*, 828 F.2d at 533. In both instances the Court of Appeals accepted the tribe's position. In *Oliphant*, tribal criminal jurisdiction over non-Indians, according to the Court of Appeals, was simply a *sine qua non* of tribal sovereignty. 544 F.2d at 1009, 425 U.S. at 196. Here, the Court of Appeals reasoned that tribal civil jurisdiction was a *sine qua non* of tribal sovereignty as it relates to the health, safety, and welfare of the Yakima Tribe. *Yakima*, 828 F.2d at 534. The presumption of the Court of Appeals is the same in both instances, and it is as fundamentally flawed here as it was in *Oliphant*.

A recognition of a retained sovereignty that would permit civil jurisdiction over non-Indian citizens on fee lands is inconsistent with the dependent tribal status and ignores a uniform tribal "forfeiture of full sovereignty in return for the protection of the United States". *Oliphant*, 435 U.S. at 211. The precedents and analysis in *Oliphant* are not limited to criminal jurisdiction, but are equally applicable here. In isolation, the Treaty with the Yakimas, 12 Stat. 951, 2 Kapplers 524 (1855) is as silent on tribal civil jurisdiction over non-Indians, as the Treaty of Point Elliot construed in *Oliphant* was on criminal jurisdiction. 435 U.S. at 206.

The addition of historical perspective casts even further, substantial doubt on the existence of such jurisdiction. 435 U.S. at 206. In Article VIII, for example, the Yakimas also acknowledge their "dependence on the government of the United States". Yakima Treaty, 12 Stat. 951, 2 Kapplers 524 (1855), *see Oliphant*, 435 U.S. at

207 for a similar acknowledgement. And as in Mr. Chief Justice Marshall's explanation cited in *Oliphant*, such an acknowledgement is not a mere abstract recognition of the United States' sovereignty, but rather is a necessary acknowledgement of dependence on the United States. It is as significant in terms of the lack of tribal civil jurisdiction over non-Indians as it is in terms of the lack of tribal criminal jurisdiction. *Id.* at 206-07.

Equally applicable are the pronouncements in *United States v. Rogers*, 4 How. 567, 571 (1846), quoted in *Oliphant*, that Indian reservations are "a part of the territory of the United States"; that Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority". *Rogers*, 4 How. at 572; *Oliphant*, 435 U.S. at 208-209. As *Oliphant* noted, "Upon incorporation into the territory of the United States, the Indian tribes thereby, come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Id.* at 209. Applicable, also, is *Johnson v. McIntosh*, 8 Wheat. 543 (1823), which states "[t]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished." 8 Wheat. at 574. *Oliphant*, 435 U.S. at 209. Limitations inherent in such a situation, as expressly set forth in *Fletcher v. Peck*, 6 Cranch 87 (1810), are similarly inclusive.

> [T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors to the United States from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*"

Fletcher v. Peck, 6 Cranch at 147; *Oliphant*, 435 U.S. at 209 (emphasis as in original).

And certainly the manifestations of the United States from the formation of the Union and the adoption of the Bill of Rights, that its citizens be protected by the United

States from unwarranted intrusions on their personal liberty, noted in *Oliphant*, are of no less importance, when viewed in the context of tribal civil jurisdiction. *Id.* at 210. In sum, these are the "precedents" this Court relied on in *Oliphant*. And, in this context, tribal civil jurisdiction is indistinguishable from tribal criminal jurisdiction in all significant respects.

2. *Presumptions.*

Admittedly, "considerable weight" was also given in *Oliphant* to the "commonly shared presumption" of Congress, the Executive Branch, and lower federal courts that "tribal courts did not have the power to try non-Indians." *Id.* at 206. But in most instances, the documentation cited in support of this presumption, undermines the existence of tribal civil jurisdiction over non-Indians as well.

The effort by tribal courts to exercise civil rather than criminal jurisdiction over non-Indians, is also a relatively new phenomenon. *Id.* at 197. Until recently, formal tribal court systems did not really exist for civil or criminal purposes. *Id.* at 197. The history of Indian treaties in the United States that is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress, is equally persuasive on the question of civil jurisdiction. *Id.* at 197-98 n. 8.

It is true that historically there has been more occasion to address the question of federal criminal jurisdiction over non-Indians, but nothing in the response even arguably adds anything to the tribe's claim for civil jurisdiction. To the contrary, in one of the two Opinions of the United States Attorney General correctly cited for the lack of criminal jurisdiction, tribal civil jurisdiction is actually the issue, and it was specifically limited to adopted non-Indian members of the tribe. *See* 2 Op. Atty. Gen. 693 (1834); 7 Op. Atty. Gen. 174 (1855). *Id.* at 199. Even more importantly, there is no evidence in any

of this federal criminal documentation that the participants did not also share the presumption that the tribes did not have civil jurisdiction over non-Indians, absent congressional statute or treaty provision to that effect. *Id.* at 199.

For this reason, we agree with the "intellectual honesty" *supra*, professed by counsel for the Yakima Tribe in *Oliphant*. Tr. of Oral Argument, at 55, *Oliphant*, 435 U.S. 191. There was no principled way for the Court in *Oliphant* to recognize that Indian tribes have inherent criminal jurisdiction over non-Indians, and not also recognize equally extensive inherent tribal civil jurisdiction. Tr. of Oral Argument, at 54, *Oliphant*, 435 U.S. 191. More importantly now, in light of *Oliphant*, it should follow, we submit, that the same principles that precluded a recognition of inherent tribal criminal jurisdiction, also preclude a recognition of inherent tribal civil jurisdiction. Surely nothing in *Montana* detracts from this position:

> Though *Oliphant* only determined inherent tribal authority in criminal matters, *the principles on which it relied support the general proposition* that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.[2]

Montana, 450 U.S. at 565 (emphasis added).

B. In *Montana* This Court Reaffirmed The Precedent And Further Delineated The Principles That Are Controlling Here.

1. *Precedent.*

Montana, importantly reaffirmed the basic premise of *Oliphant*, that tribal power inconsistent with dependent status cannot survive "without express congressional delegation". *Montana v. United States*, 450 U.S. 544, 564

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[2] *Also, see generally Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930); *Langford v. Monteith*, 102 U.S. 145, 147 (1880); *United States v. Quiver*, 241 U.S. 602, 605-06 (1916); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 501 (1946).

(1981).[3] Additionally, the Court parenthetically noted that subsequent to *Oliphant*, *United States v. Wheeler*, 435 U.S. 313 (1978), most recently reviewed principles of inherent sovereignty, and distinguished between those inherent powers retained by the tribes and those divested:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is *necessarily* inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Ibid.* (emphasis added)

Montana, 450 U.S. at 564 quoting *Wheeler* (emphasis as in original, except *necessarily*).

In addition to *Wheeler*, *Montana* further supported a rejection of sweeping treaty based arguments that "clashe[d] with subsequent history of the reservation" with the discussion of this point in *Puyallup III*, as well as detailed overview of the purposes and philosophy of the General Allotment Act. *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977).[4] *See also Montana*,

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[3] *See Mescalero Apache Tribe v. Jones et al.*, 411 U.S. 145, 148 (1973); *Williams v. Lee*, 358 U.S. 217, 219-20 (1959); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973), as cited in *Montana*, 450 U.S. at 564.

[4] In *Puyallup III*, this Court, when confronted with a treaty provision similar to that involved here regarding "exclusive" use, found that because tribal lands had been alienated pursuant to congressional enactment "[n]either the Tribe nor its members continue to hold Puyallup River fishing grounds for their exclusive use. . . ." *Id.* at 174. The significance of *Puyallup III* with regard to the present case is that it unmistakably established that "exclusive" rights created by treaty—the basis asserted by the Tribe here—are effectively extinguished with the alienation of the lands to non-Indians. *Montana* expressly recognized and confirmed *Puyallup III* in this respect. *Montana*, 450 U.S. 560-61. Therefore, there is no "exclusive" right existent under the 1855 Treaty which would authorize the Yakima Tribe to regulate non-Indians on non-Indian owned land.

450 U.S. at 559-60 nn. 8-9, 561, citing *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962), and *Draper v. United States*, 164 U.S. 240 (1896), as well as contemporary congressional and other documentation.

The Court concluded in *Montana* by carefully extending the rule in *Oliphant* as a general proposition, and then noted the "consensual" exception, clarified by express citations, and the "threatens or direct effect" exception at issue here, again clarified by express citations. *Id.* at 565-66. Neither exception fit the circumstances presented, and the Court so stated. *Id.* at 566.

Here, the Court of Appeals, we submit, ignored the rule in *Oliphant*, and ignored *Montana*'s extension of *Oliphant* as a general proposition. In its stead, the Court of Appeals seized upon the "threatens or direct effect" exception, and *without any reference* to the accompanying express citations carefully set forth by the *Montana* Court, the Court of Appeals then proceeded to ignore even the scope and the essence of that exception. As a result, the Court of Appeals fashioned its own "tribal interest" test that at least arguably encompasses tribal regulation of any reservation activity by non-Indians. *Yakima*, 828 F.2d at 535. The Court of Appeals "tribal interest" test, moreover, presumes a retained inherent tribal sovereignty rejected by this Court in both *Oliphant* and *Montana*, and promises a virtually unending and limitless case-by-case exploration of the vistas of this novel "exception". This, we submit, was the fundamental error of the Court of Appeals.

2. *The Exception.*[5]

The *Montana* "threatened or direct effect" exception to the general proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe", is straightforward and fundamental. The *Montana* Court directed attention to specific portions of four separate cases that analytically delineate the substance of this exception.

> *See Fisher v. District Court*, 424 U.S. 382, 386; *Williams v. Lee, supra*, at 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129; *Thomas v. Gay*, 169 U.S. 264, 273.[15 6]

450 U.S. at 566. The Court of Appeals either refused or neglected to even *cite*, much less discuss, *any* of these four decisions or the principles for which they were cited. The exception thereby supplanted the rule.

a) "*Fisher v. District Court*, 424 U.S. 382, 386 (1976)." *Fisher* involved an adoption dispute arising on the reservation among reservation Indians. As the Tribal Court stated, the parties "are each and all members of the Northern Cheyenne Tribe and each and all reside within the exterior boundaries of the Northern Cheyenne Indian Reservation." 424 U.S. at 384 n. 5. In such a situation, federal policy "preempted" the state Court's jurisdiction. 424 U.S. at 390. Exclusive jurisdiction was in the tribal court.

Fisher, 424 U.S. at 386, cites *Williams v. Lee*, 358 U.S. 217, 220 (1959) and notes that "since this litigation involves only Indians, at least the same standard must be met before the state courts may exercise jurisdiction", further citing *Mescalero Apache Tribe v. Jones*,

[5] The Court of Appeals recognized that *Montana* set forth two exceptions; the "consensual" exception is not involved here. *Yakima*, 828 F.2d at 533-34.

[6] "As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservations livable. *Arizona v. California*, 373 U.S. 546, 599." *Montana*, 450 U.S. at 566 n.15.

411 U.S. 145, 148 (1973) and *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-173, 179-180 (1973). *Fisher*, 424 U.S. at 386. The *Fisher* Court also noted that the right of the Northern Cheyenne Tribe to govern itself independently of state law had "been consistently protected by federal statute." *Id.* at 386.

In context, i.e., as a specific exception to *Montana*'s "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe", nothing in *Fisher* arguably supports the analysis or the holding of the Court of Appeals. *Id.* at 386.

b) "*Williams v. Lee*, 358 U.S. 217 at 220 (1959)." In *Williams*, a non-Indian sued a Navajo Indian and his wife in state court to collect for goods sold to them on the reservation where they lived. The Court noted that no Federal Act had given the state courts jurisdiction over such controversies and the issue was resolved. Exclusive jurisdiction was in the tribal court.

Williams v. Lee, 358 U.S. at 220, specifically cites a number of cases involving non-Indians where essential tribal relationships were not involved and where the rights of Indians would not be jeopardized. *Felix v. Patrick*, 145 U.S. 317, 332 (1892); *United States v. Candelaria*, 271 U.S. 432 (1926); *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948); *New York ex rel Ray v. Martin*, 326 U.S. 496 (1946); *Donnelly v. United States*, 228 U.S. 243, 269-272 (1913); *Williams v. United States*, 327 U.S. 711 (1946). The Court in *Williams*, then states "absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. Cf. *Utah and Northern Railway Company v. Fisher*, 116 U.S. 28." *Id.* at 220. Further on, *Williams* concludes that Congress has also acted consistently upon the assumption that the states have no power to regulate the *affairs of Indians* on a reserva-

tion, citing 4 Stat. 729, 735, and the 1934 Wheeler Howard Act, 48 Stat. 987.

In context, i.e., as a specific exception to *Montana*'s "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe", nothing in *Williams* arguably supports the analysis or the holding of the Court of Appeals. *Id.* at 220.

c) "*Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129 (1906)." The Court in *Catholic Missions* affirmed the dismissal on jurisdictional grounds of Catholic Missions' complaint seeking to recover taxes paid to a Montana county for an assessment on its cattle grazing on Indian land on an Indian reservation. It was alleged by Catholic Missions:

> That with a view to provide means for the carrying on of the said work of educating the said Indians the said Jesuit Fathers have acquired a large band of neat cattle, which roam over and feed upon the said reservation. That the right to keep and graze the said cattle upon the lands included within the said reservation was, long prior to the year 1895, granted to the Jesuit Fathers by the Indians residing upon the said reservation and entitled to reside thereon, which right was confirmed by the acquiescence and permission of the Government of the United States, and that the cattle now owned by them or by the plaintiff herein, as hereinafter set out, now graze upon the lands included within the said reservation by the express permission of the Indians residing and entitled to reside thereon, and of the Government of the United States.

Catholic Missions, 200 U.S. at 121-22. Initially, the Court noted:

> It is true that the property of Indians living in the tribal state, and so recognized by the Government, is withdrawn from the operation of state laws and is exempt from taxation thereunder. *The Kansas Indians*, 5 Wall. 737, 757; *United States v. Rickert*, 188 U.S. 432.

Catholic Missions, 200 U.S. at 127.

Catholic Missions, however, goes on to state that since the Indians had neither legal nor equitable title to the property in question, the cattle would not be exempt from taxation. *Id.* at 128-29. Further, the Court explained that it had previously determined:

> that the Indians' interest in this kind of property, situated on their reservations, was not sufficient to exempt such property, when owned by private individuals, from taxation. *Thomas v. Gay*, 169 U.S. 264; *Wagoner v. Evans*, 170 U.S. 588 . . . the tax put upon the cattle of the lessees was *too remote and indirect* to be deemed a tax upon the lands or privileges of the Indians . . .

Catholic Missions, 200 U.S. at 127 (emphasis added).

In context, i.e., as a specific exception to *Montana*'s "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe", nothing in *Catholic Missions* arguably supports the analysis or the holding of the Court of Appeals. *Id.* at 127-28.

d) "*Thomas v. Gay*, 169 U.S. 264, 273 (1898)." In *Thomas*, the territory of Oklahoma attempted to tax cattle grazing on reservation lands leased, pursuant to congressional authorization, by Indians to non-Indian cattlemen.

Thomas, 169 U.S. at 273, cites *Utah and Northern Railway Company v. Fisher*, 116 U.S. 28 [29; 542] (1885), and *Maricopa and P. Railroad Company v. Arizona*, 156 U.S. 347 [39;447], with approval. In those cases, the Court noted it held that:

> "the property of railway companies transversing Indian reservations are subject to taxation by the states and territories in which such reservations are located."

Thomas, 169 U.S. at 273. The *Thomas* Court then concluded it was:

> obvious that a tax put upon the cattle of the lessees is *too remote and indirect* to be deemed a tax upon the lands or privileges of the Indians.

Thomas, 169 U.S. at 273 (emphasis added).[7]

In context, i.e., as a specific exception to *Montana*'s "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities and nonmembers of the Tribe", nothing in *Thomas v. Gay* arguably supports the analysis or the holding of the Court of Appeals. *Id.* at 273.[8]

e) With the exception in mind, namely, that a tribe *may* retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe", *Fisher*, *Williams*, *Catholic Missions*, and *Thomas*, can be viewed collectively as opinions that delineate state and tribal jurisdiction. One view would be that in *Fisher* and *Williams*' situations, such as adoptions involving tribal members on the reservation and contracts involving tribal members on the reservation, or in other matters of similar intimate tribal relations, a tribal forum rather than a state forum is essential. On the other hand, *Catholic Missions* and *Thomas* unquestionably

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[7] *See also Wagoner v. Evans*, 170 U.S. 558, 591 (1898): "It is, indeed, contended that to permit the territory to tax the cattle would tend to discourage the making of such leases, and thus deprive the Indians of the advantages coming to them. *This seems to us too indirect and far-fetched an incident to affect our conclusions.*" (Emphasis added.)

[8] *Also see, Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 183-184 n.8 (1980) (Justice Rehnquist concurring and dissenting), where *Thomas v. Gay* was noted to be "part of the backdrop" which supports a state's power. Also, "*Thomas v. Gay* stands as the traditional analysis of Indian sovereign immunity held to be relevant in *McClanahan*." *Id.* at 184 n.8.

stand for the proposition that the conduct of non-Indians, even when it touches upon tribal interests, is far too remote and too indirect for the restrictions limited to purely tribal concerns to apply.

When involved in *Fisher* and *Williams*' situations, a non-member is unquestionably within the purview of the tribal restrictions. But in *Catholic Missions* and *Thomas* situations, the inherent power of the tribe does not reach and cannot preclude the proper scope of the jurisdiction of the state. Delineation, rather than balancing "tribal interest", appears to be the appropriate focal point of the *Montana* exception. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 176 (1980) (Rehnquist, J., concurring and dissenting).

Other views on the interplay of *Fisher*, *Williams*, *Catholic Missions*, and *Thomas* are certainly possible. But it is improbable that such views can, in any way, enhance the analysis or the holding of the Court of Appeals.

C. Nothing In *National Farmers Union* Or *Iowa Mutual* Detracts From The Clear Principles Established In *Oliphant* And *Montana*.

1. *National Farmers Union*.

In *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), this Court addressed the scope of *Oliphant* in a different context, not at issue here. The opinion is still important and instructive however, for several reasons.

In the first place, *National Farmers Union* details the history of tribal sovereignty and the instances in which this Court has been requested to decide the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians. *Id.* at 851-52, and nn. 12-14. Next, the opinion responds to an argument advanced by Petitioner in *National Farmers Union* that *Oliphant* rendered exhaustion in tribal courts as a matter of comity "manifestly inappropriate". 471 U.S. at 845. In effect, the Court was asked to automatically extend

Oliphant and foreclose the issue, and the Court refused. 471 U.S. at 853. In this context, the response of the Court to *Oliphant* is quite limited and unquestionably appropriate. It is obvious that *National Farmers Union* was not intended to undermine the principles of *Oliphant* (or *Montana*) in any way.[9] Yet, this is precisely the manner in which it has been recently used.

Part of the problem also apparently stems from the *Brief for the United States* submitted in *National Farmers Union*. The United States argued strenuously against the holding of the Court in *Oliphant* at the time, and as an acknowledged advocate in support of tribal civil jurisdiction over non-Indians in *National Farmers Union*, the United States understandably presented a very narrow view of this Court's *Oliphant* opinion. (Though not as narrow a view as in *Montana*, when the United States did not bother to even cite *Oliphant*). *Brief for the United States, Montana v. United States*, 450 U.S. 544 (1981). As a result, the *Brief for the United States*, at 14, in *National Farmers Union* sets forth and relies primarily on only those portions of the *Oliphant* opinion that indicate the Court's consideration of documents involving federal criminal preemption. The remainder of the *Oliphant* opinion, did not, we submit, receive the thorough attention it reserves. *See* discussion of *Oliphant*, in *National Farmers Union*, 471 U.S. at 854-56.

Similarly deserving of more thorough treatment, is the Opinion of the Attorney General of the United States also discussed in the *Brief for the United States, as Amicus Curiae*:

> Our history of Indian affairs indicates that the absence of tribal criminal jurisdiction over non-Indians is no basis for disabling Indian Tribes from exercising civil jurisdiction over non-Indians. . . . But there is nothing comparable on the civil side. Except for a brief and unusual transitional period in the Indian Territory (note 6, *infra*), no treaty nor statute has ever provided for federal adjudication of Reservation-based civil cases involving non-Indians. On the contrary, the *different rule applicable in respect of tribal assertions of civil jurisdiction was expressly noted as* early [as] 1855 in an Opinion of the Attorney General cited by this Court in *Oliphant*. 7 Op. Att'y Gen. 174, cited, 435 U.S. at 199.

[9] *See Iowa Mutual*, 107 S.Ct. at 979 (Stevens, J. dissenting).

Brief for the United States as Amicus Curiae, at 14-15, *National Farmers Union* (emphasis added). *Oliphant* certainly cited this Opinion, but not for this proposition. The *Brief for the United States as Amicus Curiae*'s "different rule applicable in respect of tribal assertions of civil jurisdiction", we submit, is in this instance premised on a difference without a distinction. The United States neglected to mention that the Opinion involved an *adopted member of the Choctaw Nation*. The Attorney General of the United States did not.

> Congress has seen fit to withhold from the Choctaw nation all criminal jurisdiction over white men within their territory, but not to withhold from them civil jurisdiction over *such white men as of their own free will and accord choose to become members of the nation.*

7 Op. Att'y Gen. 174, 185 (emphasis added). *See also* 7 Op. Atty. Gen. at 178, 181.[10] In context, the opinion of

[10] Apart from the point here, this Court has appropriately cautioned, in another context, the limited utility of arguments founded on historical Indian territory documentation ("very peculiar circumstance"):

> Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868.

Montana, 450 U.S. at 556-57 n.5. *Amici* certainly agree with this analysis and would further note that even the United States, when it suits its purpose, makes this same argument. *See* "unusual transitional period", "awkward circumstances" and "exceptional situation" referred to by United States in the *Brief of the United States, National Farmers Union*, 14, 15-16 n.6. This back-

the Attorney General thus puts the support for the "different rule" in a different light. Moreover, because this entire argument is set forth verbatim in the Strickland edition of Felix Cohen's *Federal Indian Law*, 252-57 (1982), (a tribal advocacy treatise in the opinion of many), the United States should share credit. To the extent that the Opinion in *National Farmers Union* relied on any of this, even by way of *dicta*, should really be of no consequence, for the reasons just discussed. *National Farmers Union*, 471 U.S. at 853-55.

The Opinion of the Court in *Iowa Mutual Insurance Co. v. LaPlante*, 107 S.Ct. 971 (1987), however, uses this aspect of *National Farmer Union*, by way of *dicta*, to further advance the "different rule" argument:

> Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), *their civil jurisdiction is not similarly restricted. See National Farmers Union*, 471 U.S., at 854-855, and nn. 16 and 17, 105 S.Ct., at 2453 n. 16 and 17.

107 S.Ct. at 976 (emphasis added). *Amici* doubt that *National Farmers Union* can fairly be read to support this proposition, and *National Farmers Union* is all *Iowa Mutual* cited in support of it.

2. *Iowa Mutual.*

The Court in *Iowa Mutual Insurance Co. v. LaPlante*, 107 S.Ct. 971 (1987), was presented with a question of relatively narrow scope: whether the exhaustion rule announced in *National Farmers Union* would apply when diversity, rather than the existence of a federal question, was alleged as the basis for federal jurisdiction. *Iowa Mutual* resolved the issue in favor of an extension of the exhaustion rule. *Id.* at 976-77. The principle concern

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drop should shed further light on *Morris v. Hitchcock*, 194 U.S. 384 (1904) and *Buster, et al. v. Wright, et al.*, 135 F. 947 (8th Cir. 1905), app. dismissed, 203 U.S. 599 (1906).

with *Iowa Mutual* relates not to this holding, but rather to the manner in which the Court set forth another statement relating to tribal civil jurisdiction over non-Indians. Even this aspect of the Opinion, however, is not as problematic as some would like it to be. In context, the Court did nothing more than simply recount prior decisions of this Court.

The sentence at issue appears in the Opinion in response to Petitioner's argument that the statutory grant of diversity jurisdiction overrides the federal policy of deference to tribal courts. The Court initially pointed out:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See Montana v. United States*, 450 U.S. 544, 565-566, 101 S.Ct. 1245, 1258-1259, 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-153, 100 S.Ct. 2069, 2080-2081, 65 L.Ed.2d 10 (1980); *Fisher v. District Court*, 424 U.S., at 387-389, 96 S.Ct., at 946-947. Civil jurisdiction over such activities *presumptively* lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. . . .

Iowa Mutual, 107 S.Ct. at 978 (emphasis added). And then the Court concluded:

> . . . In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.

Iowa Mutual, 107 S.Ct. at 978.

In this format, any tribal civil jurisdiction over the activities of non-Indians served the purpose for the point the Court was trying to make. This fact alone should answer those who seek to fashion a "presumption" in favor of tribal civil jurisdiction over the activities of non-Indians on fee lands from this single sentence. 107 S.Ct. at 978.

If it does not, secondly, "such activities" ordinarily, and therefore presumably, would refer to only those activities cited at the end of the immediately preceding sentence. And there can be no problem with this limited presumption. "*Montana v. United States*, 450 U.S. 544, 565-566, 101 S.Ct. 1245, 1258-1259, 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-153, 100 S.Ct. 2069, 2080-2081, 65 L.Ed.2d 10 (1980); and *Fisher v. District Court*, 424 U.S. at 387-389, 96 S.Ct. at 946-947" are all acceptable limitations. Nor should there be a problem with any requirement for limitation by treaty or federal statute. Such a limitation is the express basis for the holdings in both *Oliphant* and *Montana*. To the extent that the entire "presumption" argument appears to be "much adieu about nothing", *amici* agree. It is, however, at least indicative of the rather tenuous arguments that must be relied on to support tribal civil jurisdiction over non-Indians on fee lands. Justice Marshall's singular sentence was not intended to create such a "presumption" and such a presumption does not exist.[11] Reliance by the Court of Appeals or anyone else on this aspect of *Iowa Mutual*, is simply misplaced. *Yakima*, 828 F.2d at 533.

D. The Treaty Arguments Of The Yakima Tribe Were Correctly Rejected In Both *Oliphant* And *Montana*.

Oliphant and *Montana* are also instructive in other significant respects. Most importantly, the Yakima Tribe cannot point to any specific treaty provision or statute in substantial support of their authority, that this Court has not addressed, considered and soundly rejected in

[11] "A presumption in favor of any inherent, general jurisdiction for tribal courts is wholly inconsistent with the juridical relations between the federal government and the Indian tribes that has existed for the past 100 years." *Oliphant*, 544 F.2d at 1019 (Kennedy, J. dissenting). *See also Montana*, 450 U.S. at 564-66; Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right of Congressional License?* 51 Notre Dame Law. 600, 627 (1976).

either *Oliphant* or *Montana*. *Oliphant*, 435 U.S. at 197-99; *Montana*, 450 U.S. at 557. *See also Puyallup Tribe v. Washington Game Dept.*, 433 U.S. at 174-7 (1977) (*Puyallup III*). On the Treaty with the Yakima, the Court of Appeals could only say:

> Yakima Nation derives authority not only implicitly from its status as a dependent sovereign, but explicitly from the Treaty with the Yakimas, 12 Stat. 951, 2 Kapplers [698] (1855), in which Yakima Nation and the United States agreed that Yakima Nation reserved to itself and was guaranteed a right to its "own government" and its "own laws."

Yakima, 828 F.2d at 529. Even if the *treaty* did make a reference to its "own government" and its "own laws", which it does not, such a reservation could not make a difference in this instance, not even in isolation. In the historical context described in *Oliphant* and *Montant*, it is of even less significance. Here, as in *Montana*, the "treaty nowhere suggested that Congress intended to grant authority to the Tribe to regulate . . .". 450 U.S. at 558.

The rest of the general treaty arguments, i.e. "the exclusive use" and "without permission" clauses and so forth, are also addressed by both *Puyallup III* and *Montana*. *Puyallup*, 433 U.S. at 174-77, *Montana*, 450 U.S. at 558-63. "[T]reaty rights with respect to reservation lands *must* be read in light of the subsequent alienation of those lands." 450 U.S. at 561 (emphasis added) citing *Puyallup III* with approval. This, the Court of Appeals also refused to do, which brings us to the General Allotment Act of 1887, 24 Stat. 388.

II. THE LEGISLATIVE HISTORY OF THE GENERAL ALLOTMENT ACT CONFIRMS CONGRESS NEVER INTENDED INDIAN TRIBES TO HAVE CIVIL JURISDICTION OVER NON-MEMBERS ON FEE LANDS

The Court of Appeals cited several *recent* statutes in support of a federal policy that informed "their inquiry concerning the reach of tribal sovereignty". 828 F.2d at

533. The Court of Appeals did not cite the General Allotment Act of 1887 and did not discuss or even acknowledge the federal policy, repeatedly acknowledged by this Court, that it represents. The very presence of non-Indians on fee lands in the Yakima Reservation tracks the application of this Act to the Yakima Reservation. *Oliphant*, *Puyallup*, *Montana* and other recent decisions of this Court attest the importance of several facets of this historical fact.

This Court in *Oliphant* began with a detailed discussion of this point:

> The Squamish Indian Tribe, unlike many other Indian tribes, did not consent to non-Indian homesteading of unallotted or "surplus" lands within their reservation pursuant to 25 U.S.C. § 348 [General Allotment Act] and 43 U.S.C. §§ 1195-1197. Instead, the substantial non-Indian population on the Port Madison Reservation is primarily the result of the sale of Indian allotments to non-Indians by the Secretary of the Interior. Congressional legislation [General Allotment Act] has allowed such sales where the allotments were in heirship, fell to 'incompetents," or were surrendered in lieu of other selections. *The substantial non-Indians landholdings on the Reservation is also a result of the lifting of various trust restrictions, which has enabled individual Indians to sell their allotments. See* 25 U.S.C. §§ 349, 392 . . . [General Allotment Act].

435 U.S. at 193 n.1 (emphasis added). It would also appear that the Yakima Tribe, like the Suquamish Indian Tribe, did not consent to actual homesteading of unallotted surplus lands. The non-Indians' presence in the Yakima Indian Reservation, therefore, like the presence of non-Indians in the Suquamish Port Madison Reservation, at a minimum, tracks those provisions of the General Allotment Act noted in the Congressional legislation referred to by *Oliphant* (particularly as emphasized, *supra*). This fact should have at least been acknowledged by the Court of Appeals.[12]

In addition, in 1904, Congress passed a surplus land statute specifically applicable to the Yakima Reservation. 33 Stat. 595. This 1904 Act provided in relevant part:

> That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands embraced in the Yakima Indian Reservation proper, in the state of Washington, set aside and established by treaty with the Yakima Nation of Indians, dated June nine, eighteen hundred and fifty-five. . .

33 Stat. 595.[13] Although the precise status of this Act is not entirely clear, this Court cited this portion of the text of the Act in an unrelated conflict between the United States and the Northern Pacific Railroad Company in 1913. *Northern Pacific Railroad Company v. United States*, 227 U.S. 544, 547 n.1 (1913). And, the applicability of the General Allotment Act to timberlands within the Yakima Reservation was decided in 1924 by this Court in *United States v. Payne*, 264 U.S. 446, 447-48 (1924).

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[12] Some of this early history of allotment and application of the General Allotment Act to the Yakima Reservation is noted in *United States v. Sutton*, 215 U.S. 200, at 200-01 (1909). *See generally United States v. Winans*, 198 U.S. 371, (1905) *Washington v. Yakima Nation*, 439 U.S. 463 (1979), *United States v. Solomon*, 753 F.2d 1522 (1985) and *Holly v. Totus*, No. 85-4436, *cert. denied*, 94 L.Ed. 2d 47 (1987). *See also United States v. Pelican*, 232 U.S. 442 (1914).

[13] *See* S. Rep. No. 2738, 58th Cong., 3d Sess. 4 (1904), Appendix A *infra*, which states in part:

> No agreement has been made with these Indians, and their consent has not been secured for the opening of the reservation and the disposal of the unallotted lands. The failure to secure such consent or agreement, however, does not rest with the Government.

See also Pfaller, *James McLaughlin, The Man with an Indian Heart*, 224-26 (1978).

The silence of the Court of Appeals regarding the General Allotment Act and Yakima Reservation is especially disturbing in light of the decisions in *Montana. United States v. State of Montana*, 604 F.2d 1162 (9th Cir. 1979); *Montana v. United States*, 450 U.S. 544 (1981). In its decision in *Montana*, the Court of Appeals acknowledged that the General Allotment Act implicitly deprived the tribes of the authority to prohibit certain activities of resident non-members. 450 U.S. at 550. One would logically expect that principle, at the very least, to be addressed below and it is not. After this Court in *Montana* expressly disagreed with the restricted view of the Court of Appeals of this issue, the silence becomes more than inexplicable. 450 U.S. at 559-60 n.9 In effect, it undermines the credibility of the entire opinion.

The significance of the General Allotment Act and the conclusions of this Court are set forth and documented in detail in *Montana*, 450 U.S. at 559-60 n.9 The conclusion of this Court regarding the overall effect of the land alienation occasioned by the policy of the General Allotment Act on Indian treaty rights tied to Indian use and occupation of reservation land is equally relevant here:

> It defies *common sense* to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana, 450 U.S. at 560 n.9 (emphasis added).

Any argument that this Court's conclusion in this regard was lightly made or subsequently narrowed,[14] must necessarily overcome substantial obstacles—not the least of which is a consideration of the number of occas-

[14] The United States has already suggested that *New Mexico v. Mescalero Tribe*, 462 U.S. 324, 331 n.12 (1983) "narrowed" the *Montana* decision. *Brief for the United States* at 18 n.9, *National Farmers Union.*

sions this Court has recently been presented with extensive General Allotment Act questions. In both *DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip, et al.*, 430 U.S. 584 (1977), the arguments centered around a construction of decades of General Allotment Act primary source documentation. The opinions of the Court reflect a consideration of the issues in precisely those terms. In *Puyallup Tribe, Inc. v. Washington Game Dept.*, 433 U.S. 173 (1977) (*Puyallup III*), *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), other aspects of the General Allotment Act were also briefed and presented to this Court.[15]

In sum, *amici* does not doubt that this Court has more than sufficient reasons to support its conclusions in this regard. Still, it would not be entirely inappropriate to end the argument here where it really begins—with a brief review of the circumstances surrounding the enactment of the General Allotment Act of 1887.

Some cases in federal Indian law tend to be complex, but our position here is straightforward. Congressional intent, as reflected in the enactment of the General Allotment Act is a critical consideration. And here we can follow a path clearly marked by the prior decisions of this Court.

The policy of the federal government to be implemented by the operation of the General Allotment Act was the "civilization" and eventual assimilation of the Indian population, and the "gradual extinction of Indian reservations and Indian titles". *Draper v. United States*, 164 U.S. 240, 246 (1896); *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962). *Montana* noted these cases at the very beginning of the discussion. 450 U.S. at 559 n.9. More cases could have been cited in support of a recognition of these principles as well. *See supra.*

[15] *Also see Mattz v. Arnett*, 412 U.S. 481 (1973), and *Solem v. Bartlett*, 465 U.S. 463 (1984).

Montana also set forth the legislative history of the General Allotment Act and much of the material that follows.[16] What the Court said then is worth repeating now:

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction.

Montana, 450 U.S. at 560 n.9. *Amici* agree. Congress did not intend that non-Indians who settled upon alienated allotted or surplus lands would be subject to the civil jurisdiction of Indian tribes.

Perhaps there were reasons for the Court of Appeals not to address the General Allotment Act or any of the congressional materials set forth in *Montana*. We are not so certain. One thing, however, is certain. The decision below has condemned the non-Indians in these areas, and state and local governments, to endless rounds of needless litigation, in tribal, state and federal court, in order to sort out the details of who regulates what and whom within the limits of a new and novel "tribal interest" test. However, Congress played a role in this process. That, we submit, should be reason enough for this Court to reverse the Court of Appeals.

> Adherence to these principles of construction maximizes the ability of States and tribes to determine the scope of their respective authority without resort to adjudication, and maximizes judicial deference to the legislative forum.

Washington, 447 U.S. at 181 (Rehnquist, J., concurring and dissenting).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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[16] *See* Appendix B, *infra*, for the legislative history of the General Allotment Act submitted in *Montana*.

Respectfully submitted,

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September 2, 1988

APPENDICES

APPENDIX A

58the Congress, *3d Session.* SENATE Report No. 2738.

SALE AND DISPOSITION OF SURPLUS OR UNALLOTTED LANDS OF THE YAKIMA INDIAN RESERVATION, WASH.

DECEMBER 12, 1904.—Ordered to be printed.

Mr. GAMBLE, from the Committee on Indian Affairs, submitted the following

REPORT.

[To accompany H. R. 14468.]

The Committee on Indian Affairs, having had under consideration the bill (H. R. 14468) to authorize the sale and disposition of surplus or unallotted lands of the Yakima Indian Reservation, in the State of Washington, recommended that the same do pass.

A bill (H. R. 13522) to authorize the sale and disposition of surplus or unallotted lands of the Yakima Indian Reservation, in the State of Washington, was referred by the Committee on Indian Affairs of the House to the Secretary of the Interior for a report thereon. A report was made upon said bill by the Department and certain amendments were suggested. The suggestions of the Department were adopted and the bill changed to conform thereto and was introduced as H. R. 14468.

The report of the Committee on Indian Affairs of the House is very full and complete, setting forth the proviisons of the bill and the necessity for the proposed legislation. The report thereon by the Committee of the House is adopted as a part of this report.

HOME REPORT

The Yakima Indian Reservation was established by treaty under date of June 9, 1855. For many years the Indians have claimed that the boundary lines of said reservation as laid out are incorrect and that their reservation includes more lands than have been embraced within the recognized limits of their reservation. Under direction of the Secretary of the Interior, Mr. E. C. Barnard, of the Geological Survey, during the year 1899, made an investigation of the claims of the Indians and found that the Yakima Indians were entitled to land estimated to contain about 357,878 acres according to the terms of the treaty. . . .

This reservation, as heretofore defined, contains about 800,000 acres, of which nearly 300,000 have been allotted to the Indians. This bill proposes to recognize the validity of the claim to the tract of land adjoining the reesrvation to the extent of 293,837 acres, and of this land about 78,486 acres have been entered under the various land laws, and it is proposed that the rights of these settlers and purchasers shall not be interfered with, leaving approximately 715,351 acres to be disposed of under the terms and provisions of this bill.

Section 1 of the bill authorizes and directs the Secretary of the Interior to sell or dispose of the unallotted lands in the Yakima Indian Reservation, and recognizes the claim of the Indians to the tract adjoining their present reservation on the west, according to the findings of Mr. E. C. Barnard, and said tract is regarded as a part of said reservation for the purposes of this act. It also provides that where valid rights have been acquired prior to March 5, 1904, the date of the introduction of the first bill providing for the opening of these lands, to lands within said tract by bona fide settlers or purchasers under the public land laws such rights shall not be abridged. It also provides that the claim of the Indians to such lands shall be considered as fully

compensated for by reason of the expenditure of large sums of money on said Yakima Reservation for the benefit of these Indians. A little over 78,000 acres have been taken out.

This land is largely grazing land and sparsely timbered. The Government has expended many thousands of dollars for the benefit of these Indians in the past, and last year the sum of $45,000 was est aside for the construction of an irrigation ditch to water the Indian lands. This will be of very great benefit to the Indians, and your committee feel that it is but just and fair that these moneys should be set off against the lands taken out of the disputed tract, and they consider this full compensation for the claims of the Indians to such lands.

Section 2 provides that allotments shall be made to any Indians entitled thereto, including children now living born since the completion of existing allotments and who have not already received allotments. The Secretary also may reserve such lands as he may deem necessary or desirable in connection with irrigation systems for agency, school, and religious purposes, and such grazing and timber lands as he deems best for the uses of the Indians in common, provided he may dispose of such lands from time to time under the terms of the bill if he may deem best.

Section 3 provides for the classification of the lands by the Secretary of the Interior as irrigable, grazing, timber, mineral, and arid lands, and provides for their appraisement by legal subdivisions, except that the mineral lands need not be appraised and the timber lands shall be appraised separately. The basis for the appraisal of the timber shall be the amount of standing merchantable timber thereon. When the classification and appraisement is completed the lands shall be disposed of under the general provisions of the homestead laws of the United States, and shall be open to settlement and entry, at not less than their appraised value, by proclamation of the

President. The proclamation shall prescribe the manner in which the lands shall be settled on, occupied, or entered, and no person shall be permitted to settle upon, occupy, or enter any of the said lands except as prescribed in such proclamation uuntil after the expiration of sixty days from the time when the same are opened for settlement. The rights of Union soldiers and sailors of the civil and Spanish wars and the Philippine insurrection shall not be abridged.

* * * *

Section 4 provides that the proceeds arising from the sale or disposition of the lands aforesaid, including the sums paid for mineral lands, exclusive of customary fees and commissions, shall, after deducting the expenses incurred from time to time in connection with the appraisement and sales, be deposited in the Treasury of the United States to the credit of the Indians belonging to and having tribal rights on the Yakima Reservation, to be expended for their benefit under the direction of the Secretary of the Interior in the construction, completion, and maintenance of irrigation ditches, purchase of wagons, horses, farming implements, materials for houses, and other necessary and use ful articles as may be deemed best to promote their welfare and aid them in the adoption of civilized pursuits and in improving and building homes for themselves. It authorizes the payment in cash to the Indians per capita, share and share alike, if the Secretary deems it best, but not otherwise.

* * * *

The reservation is a treaty reservation, and this bill recognizes not only the right of the Indians to the use and occupancy of the lands, but in effect recognizes the title of the Indians to the lands and secures to them the entire proceeds arising from the sales made. It is very proper that the expenses necessarily incurred in disposing of these lands shall be defrayed out of the proceeds of the sales. A long-standing dispute between the Government and the Indians is settled and the title of the Indians to

the lands claimed by them is recognized, and, instead of the Government being required to pay the Indians a large sum of money for the disputed tract, the Indians will receive whatever these lands bring under the terms of this bill. No agreement has been made with these Indians, and their consent has not been secured for the opening of the reservation and the disposal of the unallotted lands. The failure to secure such consent or agreement, however, does not rest with the Government.

Repeated attempts have been made to reach an agreement with these Indians and very liberal terms have been offered, but the Indians have declined to enter into such an agreement. The Crow-Flathead, etc., Commission negotiated with these Indians from time to time from 1896 until 1901, when the commission was discontinued. Since then special agents of the Government have endeavored to make a satisfactory agreement, but have failed. Under these circumstances your committee do not feel that further negotiations should be carried on in order to secure the consent of the Indians.

This reservation is situated about 4 miles from North Yakima, a city with a population of about 7,000 people. It is located in the very heart of the irrigated district of Yakima County, and of the State of Washington, and is a very great hindrance to the continued and complete development of that country. With so large a body of land as that held from settlement and cultivation, settlement and growth can not help but be retarded. We believe it to very important that this reservation should be opened at once.

The provisions of the bill with reference to the appraisement and classification are very important. The lands of this reservation are of a varied character. Much of them are arid, sage-brush lands; some of this can be watered, and when this is done the land is of very great value. Some of it, however, is not likely to be watered for

many years, and naturally this is of little worth. Some of the land nearer the mountains is fairly good grazing land, and there is some tolerably good timber, rather remote, however, from transportation. These various conditions make it very necessary that much latitude shall be given the Department in the disposition of the lands, and the provisions of the bill in this respect are absolutely necessary by reason of these various conditions.

APPENDIX B

[EXCERPTS OF ARGUMENT]

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents,

vs.

THE STATE OF MONTANA, MONTANA STATE FISH and GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE STATE OF MINNESOTA and MINNESOTA COUNTIES OF BECKER, BELTRAMI, CASS, CLEARWATER, KOOCHICHING, LAKE OF THE WOODS, MAHNOMEN and PENNINGTON

---

* * * *

IV. THE GENERAL ALLOTMENT ACT ABROGATED ANY AUTHORITY WHICH THE CROW TRIBE ORIGINALLY MIGHT HAVE HAD TO REGULATE HUNTING AND FISHING BY NON-INDIANS ON NON-INDIAN LAND.

As early as 1880, bills were introduced in Congress which provided generally for the allotment of reservation lands to Indians.[11] In 1881 a bill substantially similar to the General Allotment Act (S. 1773) was debated extensively in the Senate.[12] From the outset of and throughout the debates respecting the 1881 bill, it was clearly understood by all the members of the Senate that the purpose of the bill was to civilize the Indian population of the country and this was to be accomplished in part by the dissolution of tribal relations.[13] For example, Senator Saunders stated early in the debates on S. 1173 as follows:

> Heretofore we have recognized the tribal relations. . . . But now a new order of things is about to be established, as I understand. The people of this country are in favor largely, in my opinion, of giving the Indians the rights of citizenship, of making them citizens, and requiring of them all that is required of others . . . .
>
> * * * *
>
> I only wanted to say that I favor the principle of the bill, that I wish it to be known that I am in

[11] *See* H.R. 5038, 46 Cong., 2nd Sess. (1880); S. 1773, 46th Cong., 3d Sess. (1880).

[12] *See* ***United States v. Mitchell,*** —— U.S. ——, 100 S.Ct. 1349, 1354, n.4 (1980).

[13] *See e.g.*, XI Cong. Rec. 779 (Sen. Vest), 782 (Sen. Coke), 783-84 (Sen. Saunders), 785 (Senators Morgan and Hoar), 881 (Sen. Brown), 906 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064 and 1065 (Sen. Plumb), 1067 (Sen. Williams).

> favor of dividing the lands up into severalty to these people, and in favor of the earliest possible breaking up of the tribal relation and making them citizens in every sense of the word.

XI Cong. Rec. 783-84.

As part of the effort to civilize the allottees, it was expressly provided in the bill that upon issuance of the patent for the allotment, the allottee was to become subject to the laws of the territory or state in which the allotment was situated.[14] What is significant about this provision for purposes of this case is that the allotment of lands and the resultant extension of state law was consistently equated with the dissolution of tribal affairs; that is, the extension of state jurisdiction was to result in the termination of tribal jurisdiction.[15] Thus, it was understood and intended that with the extension of state or territorial jurisdicion upon issuance of a patent, the tribal relations of the allottees were to be, in effect, terminated.[16]

[14] *S. 1773, supra* at § 6. *See* XI Cong. Rec. 778-79 (Sen. Coke), 875 (Sen. Hoar), 878 (Sen. Coke), 1029 (Sen. Plumb), 1066 (Sen. Kerman), 1067 (Sen. Morgan).

[15] *See, e.g.,* XI Cong. Rec. 785 (Sen. Morgan), 875 (Sen. Hoar), 878 (Senators Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Senators Edmunds and Williams). As Senator Hoar pointed out during the course of the debates on S. 1773.

> An Act of Congress may undoubtedly take away that shield, may destroy the tribal relation, and very likely do what this statute in express terms undertakes to do—that is, subject the Indian to State law . . . .
>
> * * * *
>
> So if you make an Indian subject to the law of the State, it is not by limiting or by extending the operation of that law; it is by taking away from the Indian the tribal character . . . .

XI Cong. Rec. 1028.

[16] *See e.g.* XI Cong. Rec. 875 (Sen. Hoar), 876 (Sen. Morgan).

The significance of the foregoing discussion to the present case is readily apparent. It is unreasonable to conclude that Congress intended to terminate tribal authority over individual Indian allottees and at the same time subject non-Indian settlers to tribal jurisdiction. *Cf. Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 203 (discussion respecting significance of 1854 Amendment to the Trade and Intercourse Act). Moreover, it is unlikely that Congress intended that non-Indians entering the reservation would be subject to tribal jurisdiction since the avowed purpose of the bill was, in part, the ultimate destruction of tribal government.[17] Nowhere in the debates on S. 1773 is there any mention or implication of an understanding that the incoming settlers would be subject to tribal jurisdiction.[18] If Congress had con-templated that tribal jurisdiction would extend to non-Indians, express mention would have certainly been made of such. To the contrary, however, repeated references were made during the debates to making Indian allottees amenable to the laws which governed the incoming settlers.

[17] In addition, Congress intended that civilization of the Indian population would be facilitated in part by non-Indians who would settle upon the surplus and alienated allotted lands and would thus expose the allottees to the way of civilization. *See e.g.*, XI Cong. Rec. 876 (Sen. Morgan), 877 (Sen. Hoar). *See also* XVII Cong. Rec. 1762-63 (Senators Teller and Dawes); Report of the Secretary of the Interior (1891), p. VI; Report of the Commissioner of Indian Affairs (1891), pp. 46-47; Report of the Secretary of the Interior (1892), p. XXXIII. It would be incongruous for Congress at the same time to intend that the tribes exercise authority over the non-Indians on the fee patented lands.

[18] It must have been contemplated by Congress that the opening of the vast territories encompassed by the Indian reservations to eventual non-Indian settlement could lead to the development predominantly non-Indian towns and communities. In fact, to aid the efforts to settle the vast territories opened during this era, Congress enacted legislation permitting right-of-ways for highways to be established on Indian lands and the condemnation of individual Indian lands for public purposes. Act of March 3, 1901, 31 Stat. 1084, §§ 3 and 4, 25 U.S.C. §§ 311, 357.

Additionally, it is evident from the debates on S. 1773 and similar bills debated in later sessions that Congress knew and understood that after the 25-year alienation restriction had expired, much of the allotted lands would pass to non-Indian ownership. *See e.g.*, XI Cong. Rec. 783 (Sen. Teller), 882 (Sen. Brown), 934 (Sen. Hoar); XVIII Cong. Rec. 974 (Sen. Dolph). *See generally* Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash. L. Rev. 479, 506-07 (1979).

Review of the legislative materials pertinent to subsequent versions of S. 1773 reveals that the underlying understanding evidenced in regard to that bill prevailed in Congress and thus was carried forth and enacted in the General Allotment Act.[19] For example, Representative Skinner, one of the sponsors of the General Allotment Act in the House of Representatives, stated as follows:

> This means that the tribal relations must be broken up; that the practice of massing large numbers of Indians on reservations must be stopped; that lands must be allotted in severalty. . . .
>
> . . . . Let him [the Indian] become a citizen of the United States and be taught by contact with the white man. And in addition thereto give him his land as is provided in this bill *and extend over him and his property the same protection that is accorded to white men*. . . .

XVIII Cong. Rec. 190-91 (emphasis added.) In addition, it was recognized in the Senate that the bill then before

[19] *See e.g.*, XIII Cong. Rec. 3211 (Sen. Conger) and 3212 (Senators Conger and Dawes) (1882); XIV Cong. Rec. 2279-80 (Sen. Coke), 2280 (Senators Dawes and Call) (1884); XVII Cong. Rec. 1630 (Sen. Dawes), 1632 (Sen. Maxey), 1634-35 (Sen. Maxey), and 1762 (Sen. Teller) (1886); XVIII Cong. Rec. 190 (Rep. Skinner), and 191 (Representatives Skinner and Perkins) (1886).

Additionally, S. 1773 was similar to the General Allotment Act in most significant respects. In later sessions, bills essentially identical to the 1887 Act were debated in and passed by the Senate. *See United States v. Mitchell*, ——U.S. ——, 100 S.Ct. 1349, 1354 (1980); S. 1455, 47th Cong., 1st Sess. (1882); S. 48, 48th Cong. 2d Sess. (1883).

it (the General Allotment Act) had passed the Senate substantially in the same form as in previous sessions of Congress. *See, e.g.*, XVII Cong. Rec. 1558 and 1559 (Sen. Dawes), 1762 (Sen. Teller). As pointed out by Senator Dawes, the author of and one of the primary spokesmen for the General Allotment Act, "this is a very important bill in reference to the Indians. It has been considered, as I have already said, a great many times in the Senate." XVII Cong. Rec. 1559. Since the bill which was enacted in 1887 was viewed as essentially the same as that considered in earlier sessions and since the underlying assumptions regarding the cessation of tribal relations and the immediate extension of state laws to allottees were the same as in previous sessions,[20] it must be assumed that the intentions and understandings of Congress regarding tribal jurisdiction over non-Indians under earlier versions of the bill were, in effect, carried forth and enacted in 1887.

In light of the history just discussed, the State and Counties believe that the court below was far too narrow in its construction of the Congressional intent in passing the General Allotment Act. It appears that Congress not only contemplated that non-Indian residents would not be

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[20] Contemporaneous administrative materials respecting the General Allotment Act confirm that the underlying assumptions of Congress in enacting that Act was the same as in previous sessions. *See, e.g.*, Report of the Commissioner of Indian Affairs (1887), pp. VI, VIII-IX; Report of the Secretary of the Interior (1888), p. XXXI; Report of the Commissioner of Indian Affairs (1890), p. VI; Report of the Commissioner of Indian Affairs (1891), p. 6. Thus, as pointed out in the Report of the Secretary of the Interior for 1888,

> A beginning has already been made upon another line of policy, from which much appears justifiably to be hoped—the complete dispersion of the tribes and bands by the establishment of individuals as landowners and the investment of them with the dignity, rights and privileges of citizens in the State and nation.

Id. at XXXI.

subject to tribal regulation on their own property, but that all non-Indians, resident and non-resident, would not be subject to tribal regulation on all non-Indian owned lands within the reservation. The exercise of tribal sovereignty in the instant case would therefore be inconsistent with the overriding interests of Congress in opening reservations to non-Indian settlement. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. at 4673.

* * * *

Supreme Court, U.S.
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Nos. 87-1622, 87-1697, and 87-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,

Respondents.

STANLEY WILKINSON,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

COUNTY OF YAKIMA, *et al.*,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR CITIZENS EQUAL RIGHTS ALLIANCE, INC. (CERA), BIG ARM MONTANA, AS AMICUS CURIAE, A NATIONAL COALITION IN SUPPORT OF PETITIONERS

(Coalition Members on Inside Cover)

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. THE YAKIMA NATION DOES NOT HAVE INHERENT CIVIL JURISDICTION OVER NON-MEMBERS LIVING ON FEE LANDS WITHIN THE YAKIMA RESERVATION	12
A. The Ninth Circuit Misinterpreted the *Montana v. United States* Decision and Ignored Vital Precedent	12
B. The General Allotment Act and Other Laws Opening Up the Reservations to Non-Member Settlement Restricted Any Authority the Tribe Might Originally Have Had Over Non-Members	18
C. The Ninth Circuit Expanded Montana's Exceptions Far Beyond Their Intent and Meaning	20
II. IF TRIBAL AUTHORITY IS FOUND TO EXIST OVER NON-MEMBERS, THE STATE AND COUNTY MUST ALSO HAVE SUCH AUTHORITY	22
III. ZONING BY THE TRIBAL GOVERNMENT OF LAND OF NON-MEMBERS WHO ARE UNREPRESENTED IN SUCH GOVERNMENT AFFECTS FUNDAMENTAL CONSTITUTIONAL RIGHTS	25
CONCLUSION	27
APPENDICES:	
A. Becker County Record, Aug. 14, 1988, at 1, col. 1 and 6A, col. 1	1a
B. Detroits Lakes, Apr. 14, 1988, at 1A, 10A	2a

TABLE OF CONTENTS—(Continued)

	Page
C. Daily Press, North Wisconsin's Morning Newspaper, July 1, 1988, at 1 col. 1	2a
D. Letter from Ann Schoenborn, Co-Chairperson, United Township Association to Mr. Robert Gleason, White House, Washington, D.C. (Aug. 12, 1983) (discussing White Earth Tribe)	3a
E. Letter from David Rasmussen, Game Warden, Minnesota Dept. of Natural Resources to State of Minnesota (May 5, 1988) enclosing Letter from John M. Sieling, Chief Deputy, Becker County, Minnesota to David Rasmussen (April 28, 1988)	4a
EE. Map of Flathead Reservation, Montana by Dept. of Interior (March 20, 1915), denotes "Boundary of *Former* Flathead Indian Reservation"	5a
F. Aquatic Lands Conservation Ordinance No. 87-A of the Council of Confederated Salish and Kootenai Tribes	5a
G. Glacier Reporter, December 12, 1985 at 9, 10 (Proposed Blackfeet Comprehensive Tax Code)	6a
H. Great Falls Tribune, April 11, 1987 at 12(A) (discussing Blackfeet 4% possessory tax)	7a
I. Great Falls Tribune, at 1A (discussing Blackfeet 4% possessory tax)	7a
J. Letter from Lee Jacobsen, Secretary of East Slope Taxpayers Association of August 16, 1988, to "whom it may concern" (Aug. 16, 1988)	8a
K. West Valley Watch, Inc., Aug. 17, 1988 (discussing Confederated Tribes of Grand Ronde)	9a
L. Albuquerque Journal, Aug. 31, 1983, at A-a, A-3 (discussing Sandia Pueblo)	9a
M. Cheyenne River Sioux Tribe Ordinance No. 42a	10a
N. 53 Fed. Reg. 20, 179 (1988)	11a

TABLE OF CONTENTS—(Continued)

	Page
O. Draft of By-laws of Cheyenne River Sioux Tribe (Dec. 23, 1935)	11a
P. Complaint of Cheyenne River Sioux Tribe v. Farmers Union Oil Lester Starr (July 25, 1988)	12a
Q. Letter from Wayne Ducheneaux, Chairman of Cheyenne River Sioux Tribe to Mr. Green, Mayor of Dupree (Feb. 12, 1988) with Resolution No. E. 52-88-CR attached	13a
R. Letter from Wayne Ducheneaux, Chairman of Cheyenne River Sioux Tribe to Kenn Pugh (June 6, 1988)	13a
S. Letter from Congressman Sensenbrenner, Wisconsin, to Constituent (June 28, 1988)	14a

TABLE OF AUTHORITIES

CASES	Page
California v. Cabazon Band of Mission Indians, —— U.S. ——, 107 S.Ct. 1083 (1987)	16
Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980)	23
Crow Creek Sioux Tribe v. Buum, 10 Indian L.Rep. 6031 (Intertribal Ct. App. 1983)	16
Draper v. United States, 164 U.S. 240 (1896)	22
Ex Parte Crow Dog, 109 U.S. 556 (1883)	17
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. ——, 107 S.Ct. 2378 (1987)	26
Fisher v. District Court, 424 U.S. 382 (1976)	21
McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973)	13
Montana v. United States, 450 U.S. 544 (1981)	*passim*
Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906)	21
Nectow v. Cambridge, 277 U.S. 183 (1928)	26
Oliphant v. Schlie, 544 F.2d 1007 (1976)	25
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	*passim*
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)	19
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	10, 12, 14, 17
Solem v. Bartlett, 465 U.S. 463 (1984)	7
Surplus Trading Co. v. Cook, 281 U.S. 647 (1930)	22
Thomas v. Gay, 169 U.S. 264 (1898)	21
United States v. McBratney, 104 U.S. 621 (1881)	22
United States v. Mission Golf Course, Inc., 548 F.Supp. 1177 (D.S.D. 1982)	8
United States v. Morgan, 614 F.2d 166 (8th Cir. 1980)	8
United States v. Wheeler, 435 U.S. 313 (1978)	10, 13, 18, 21
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	26
Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980)	14

TABLE OF AUTHORITIES—Continued

	Page
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	22, 23
Williams v. Lee, 358 U.S. 217 (1959)	21, 23, 25
Yakima Indian Nation v. Whiteside, 617 F.Supp. 735 (D.C. Wash. 1985)	20
STATUTES AND TREATIES	
General Allotment Act of 1887, 24 Stat. 388	11, 18
18 U.S.C. 1151	7
18 U.S.C. 1154(c)	8
Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303	14
Indian Financing Act of 1974	16, 23
Indian Child Welfare Act of 1978	16, 23
OTHER AUTHORITIES	
53 Fed. Reg. 20, 179-20, 180 (1988)	7
Cohen *Handbook of Federal Indian Law* (1942)	22
1 Anderson, American Law of Zoning (3rd ed. 1986)	26
McQuillin, *Municipal Corporations* (3rd ed. 1983)	25, 26
Cheyenne River Sioux Tribe Constitution By-laws, Article IV § 1(c)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1622, 87-1697, and 87-1711

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR CITIZENS EQUAL RIGHTS ALLIANCE, INC. (CERA), BIG ARM MONTANA, AS AMICUS CURIAE, A NATIONAL COALITION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Amicus Curiae Citizens Equal Rights Alliance, Inc., Big Arm, Montana, is a national volunteer non-profit organization incorporated under the laws of the State of Montana. It is a coalition of citizens groups and individuals from fourteen (14) states who are concerned and alarmed at the direction federal Indian policy has taken, especially how tribal governments and some courts have interpreted and molded that policy. The over four hundred thousand (400,000) people from all walks of life who make up the Citizens Equal Rights Alliance, Inc. are dedicated to effecting positive change in federal Indian policies. They are concerned with the problems associated with the exercise of tribal civil jurisdiction over non-members of the tribe who are not allowed any representation in the government that seeks to govern them. And while the members of this organization seek responsible change in this system, they often bear the stigma of racism for opposing any extensions of tribal power.

Totally Equal Americans is an association of individuals residing and working on or near reservations in nine (9) states, with its headquarters in Waubun, Minnesota. These citizens sense the frustration and suffer a lesser quality of life from the imposition of tribal regulations and taxes in areas such as water rights, hunting and fishing, zoning, and employment. They are also concerned how this expansion of tribal power has affected their rights under the 5th and 14th Amendments to the United States Constitution, guaranteeing them "equal protection".

Protect Americans' Rights and Resources has a national membership of nearly five thousand (5,000) people, consisting of business people, fee land holders, farmers, utilities, business organizations, and outdoor recreationists. One of the specific concerns of this organization is the granting of special privileges to tribal members who do not reside on reservations. The Chippewa Indians of Wisconsin, for example, now claim a superior right to

timber, hunting, and fishing in Northern Wisconsin, whether located on a reservation or off a reservation.

The Tulaby Lake Association and White Earth Equal Rights Committee, Inc., are groups of citizens who live on or near the former White Earth Reservation in Northern Minnesota. These organizations are made up of resort owners, farmers, business people, property owners, and outdoor sportsmen.

United Townships Association is an organization of thirty-two (32) township governments also within the original boundaries of this Reservation. One of the concerns of these groups in this area is the difference in fishing regulation between members and non-members and the associated law enforcement problems. Also, the White Earth Reservation Tribal Council, in 1981, passed Ordinance Eight, a natural resources preservation act, which applied to all individuals. Although that particular ordinance was later ruled invalid by the Department of the Interior, this is a clear example of how Indian tribes are seeking to increase their power.

New York State Conservation Council is a group of fee land owners, outdoor sportsmen, local elected officials, and business people. These individuals face land claims from various Indian tribes in New York and the certain extension of tribal rule and regulation to their personal and professional lives.

Interstate Congress for Equal Rights and Responsibilities is a national non-profit group headquartered in Washington state. Their interests, given the location of this case, is as obvious as is their concern for the expansion of tribal claims.

North Dakota Committee for Equality is a non-profit organization organized under the laws of the State of North Dakota. The membership of this organization include farmers, business owners, teachers, and fee land owners who reside on or near the original Fort Berthold

Reservation in North Dakota. Part of the original Reservation, three hundred sixty-five thousand (365,000) acres in total, lies in portions of three North Dakota counties. Of this acreage, less than one percent is owned in trust. For years the Fort Berthold Tribal Constitution contained a provision restricting the civil jurisdiction of the Tribe to tribal members. However, that provision has now been repealed. Consequently, the members of this organization are now claimed to be subject to tribal civil jurisdiction, subject to the ruling of this Court.

All Citizens Equal is an association of over 1,000 members, primarily resident and non-resident fee land owners within the "former" Flathead Reservation of Western Montana. The land owners are principally farmers and ranchers, orchard owners, small business owners, retirees, and resort owners. Membership also includes non-resident land owners and sports enthusiasts. They utilize private and state land for recreation including hunting and fishing, and other sports on Flathead Lake. For years, land in the area was known as being on the *former* Flathead Reservation. Yet, the Confederated Salish and Kootenai Tribes have and continue to expand their claim in non-members' lives through a burdensome number of lawsuits. For example, the Confederated Tribes passed Ordinance No. 87-A, the Aquatic Lands Conservation Ordinance, which would require the acquisition of permits and payment of fees for construction of any project on or near wet lands anywhere on the Flathead Reservation, even though the Reservation population is eighty-five percent (85%) non-members and eighty-five percent (85%) of the land is owned in fee. Moreover, this Tribe has summarily rejected *Montana* and continues to claim exclusive hunting and fishing jurisdiction on private land.

Citizens Rights Organization has a membership of farmers, ranchers, and small businesses in Big Horn County in Eastern Montana. Their area is in the original Crow Reservation. Approximately fifty percent

(50%) of the land is owned in fee by non-members. The Crow Tribe has and is currently seeking to levy taxes on non-members residing on the Reservation. They have also attempted to regulate the use of farm chemicals, insecticides, and herbicides on fee land on the Reservation.

East Slope Taxpayers Association is a non-profit group of fee land owners, farmers, ranchers, business owners, sportsmen, and conservationists who reside or recreate on the original Blackfeet Reservation in Northern Montana. Civil jurisdiction problems have all but stopped lending agencies and insurance companies from doing business on the Blackfeet Reservation. Oil companies have all but ceased to drill or pump oil. A tribal liquor license is one thousand dollars ($1,000.00). The Blackfeet Tribe is attempting to control the sale of tax-free cigarettes and gambling. The Tribe has also imposed a four percent (4%) possessory interest tax on utility companies, railroads, and oil companies, with the formula based, in part, on holdings outside the Reservation. The local Rural Electric Cooperative reluctantly passed this tax on to the local consumers in the form of a one dollar ninety cent ($1.90) surcharge.

Samuel E. Davis is an individual member of *Amicus* Citizens Equal Rights Organizations, Inc., who resides in and is Mayor of Parker, Arizona. Parker is surrounded on three (3) sides by the Colorado River Reservation and on the fourth side by the Colorado River. In 1983 the Colorado River Indian Tribes filed suit to have the city stop its enforcement of the city building codes on tribally held lots in Parker. Further conflicts have since generated on liquor licensure, zoning, business and health permits, and law enforcement. Since these tribal power expansions, the quality of life in Parker has deteriorated. The Tribe also has imposed a tribal boycott on Mr. Davis' businesses due to his stand as Mayor in these disputes.

Concerned Citizens Council consists of resident and non-resident fee land owners, farmers, and businessmen

who reside on the original Omaha and Winnebago Reservations in Thurston County, Nebraska. The Omahas were retroceded jurisdiction in 1969 and the Winnebagos in 1986. The concerns of this organization are what they perceive to be well settled legal principles, are foreign concepts in federal Indian law, for example, statutes of limitation.

The Omaha Tribe is also suing to regain jurisdiction and title to land across the Missouri River in Monoma County, Iowa. If such a suit is successful, memb rs of Monomo County Land Association would be claimed to come under tribal civil jurisdiction. The members of this Organization, landowners, farmers, and businesses who have been in this area of Iowa for at least a century, would then be subject to a system, totally foreign to them, in which they have no representation.

West Valley Watch, Inc., a volunteer non-profit corporation organized under the laws of the State of Oregon, consists of landowners, farmers, and business owners also concerned with the effects of a formation of a new reservation in their area. The creation of a new nine thousand eight hundred (9,800) acre reservation for the Confederated Tribes of Grand Ronde in Western Oregon would subject the members of this organization to claims of tribal civil jurisdiction. Once again, people who have lived in an area for several years are suddenly being thrust into a governmental system totally unknown to them.

James L. Mitchell is also an individual member of the *Amicus* Citizens Equal Rights Alliance, Inc., who resides in Jemez Pueblo, New Mexico. Mr. Mitchell is typical of those who are deeply interested and concerned with the continuing expansion of the tribes and pueblos of New Mexico and Arizona. Extensive litigation has taken place between the federal government, the tribes, and individual land owners in the area of water rights. Also efforts

are being made by the Sandia Pueblo to reclaim nine thousand four hundred (9,400) acres they maintain was deprived of them by an erroneous 1859 survey. They are also concerned with the expanding efforts of the tribes to tax and assert tribal jurisdiction over non-member individuals and businesses, outside of the Navajo Reservation.

Cheyenne River Landowners Association is a group of farmers, ranchers, business owners, and local elected officials in Dewey and Ziebach Counties in South Dakota. These people are fully aware of what can happen when tribal jurisdiction is suddenly thrust upon them, and mirror others who we put in the same situation. Until this Court's decision in *Solem v. Bartlett*, 465 U.S. 463 (1984), portions of the Cheyenne River Sioux Reservation were not considered Indian country. 18 U.S.C. 1151. After the decision in that case, the Cheyenne River Sioux Tribe has greatly expanded its efforts to govern non-members. The Tribe has passed a Tribal Employment Rights Ordinance (TERO), which requires an excise tax, and Indian preference in employment, hiring and contracting, whether the project is on trust or fee land.

The Cheyenne River Sioux Tribe has also been active in the area of liquor licensure. The Tribe passed Ordinance No. 48, the Alcohol Beverage Control Law, applying the Ordinance expressly to all lands, whether trust, allotted, or fee lands, repealing an earlier ordinance which only applied to "Indian land". The Tribal Ordinance was approved by the Department of the Interior on June 2, 1988, and is found at 53 Fed. Reg. 20,179-20,182. The Assistant Secretary for Indian Affairs, Ralph R. Reesen, noted at 53 Fed. Reg. 20,179-20,180:

> Section 1-1-2 and 1-1-3(B) apply to [the] tribal liquor ordinance to all lands within the reservation boundaries. There is no reference to the two exemptions to the tribe's jurisdiction as described in 18 U.S.C. 1154(c). However the existence of land entitled to either of the two exemptions, fee patent lands in non-

> Indian communities or rights of way through Indian reservations, is a factual determination to be decided by the Courts.

The Tribe has since filed a number of lawsuits in the Cheyenne River Sioux Tribal Court to enforce this ordinance. This is done in spite of the Assistant Secretary's statement, in spite of the existence of 18 U.S.C. 1154(c), in spite of the existence of *United States v. Morgan*, 614 F.2d 166 (8th Cir. 1980) and *United States v. Mission Golf Course, Inc.*, 548 F. Supp. 1177 (D.S.D. 1982), and in spite of a By-law provision in the Cheyenne River Sioux Tribe Constitution By-laws, Article IV, Section 1(c), which limits the jurisdiction of the tribal courts over non-members to instances where the member and non-member litigants *stipulate* to the jurisdiction of the tribal court. The Cheyenne River Sioux Tribe has also put in place a tribal boycott of businesses in municipalities which do not follow their liquor control ordinance. This is all done in the name of "inherent tribal sovereignty".

The Cheyenne River Sioux Tribe has also made attempts to collect a tribal business license fee from business owners on the Reservation, including from present counsel of record. Once again these efforts to collect a tax are done in spite of the Tribal Constitution and By-laws.

The people who make up the membership of *amicus* fall into several categories. Many of the people have lived in these areas for all their lives, some are the second or third generation in the area. Others, while not in the area for as long, nonetheless rely on the area for their livelihood. Other members of *amicus*, while they do not actually live on reservations, work or conduct business on the reservation. Still others enjoy the vast recreational opportunities available. Yet, all these people face the prospect of ever increasing tribal civil jurisdiction, unless it is checked by this Court.

There are similar threads which weave together the common interest of the *amicus*. First, nearly all the ordinances, either passed or proposed, by various Indian tribes across the country say on their face that the action taken or proposed is done to regulate conduct which has a direct impact on the political integrity, economic security, or health or welfare of the tribe, thus parroting the language contained in *Montana v. United States*, 450 U.S. 544, 566. The tribes have taken one paragraph of dicta in *Montana* and literally attempted to mushroom their power into every conceivable facet of the lives of non-members living on reservations and individuals who do not reside on reservations but conduct their business or recreational activities on reservations. Until the matter is further defined or restricted by this Court, the tribes will continue to test the boundaries.

The other thread of common ground which holds the *amicus* together is their shared frustration as to their inability to effect positive change within tribal government. One might say that this is very similar to an American who resides in a country overseas. There is one important distinction, however. An American citizen who resides overseas can, if he so chooses, give up his American citizenship and seek the citizenship of the country in which he lives. American citizens who live on tribal reservations within this country, do not have that ability. Tribal membership is severely limited by blood quantums. Moreover, *Amicus* feels that the only protection they have from the increasing efforts of tribes to govern them is the courts.

Further, *amicus*, whatever their race, look at their issues as lay people. As lay people they do not understand (nor do some lawyers) the complicated legal issues involved in cases such as these which bring such confusion to their lives. They can, however, comprehend the distractions which these issues bring into their lives. They see how these issues impair and reduce the quality of life.

Also, they see these issues as individuals, and not in the light of local, state, or tribal governments.

Finally, *amicus* fully realizes that unbridled zoning can deprive them of the use of their land and further depreciate its value. They also fully realize under *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), they cannot seek compensation from a tribal government for such a zoning. This cannot be what Congress envisioned.

SUMMARY OF ARGUMENT

The Yakima Nation does not have inherent civil jurisdiction over non-members living on fee lands within the Yakima Reservation.

The Ninth Circuit misinterpreted *Montana v. United States*, 450 U.S. 544 (1981), and ignored the vital precedents *Montana* used as the framework for its opinion (i.e., *United States v. Wheeler*, 435 U.S. 313 (1978), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)). A careful review of these cases by the Ninth Circuit would have made it recognize several important principles essential in determining the instant issue. First, the Ninth Circuit would have had to recognize the reduced reliance that courts should give to "platonic notions of Indian sovereignty". Tribal sovereignty over non-members should be analyzed in terms of the "tradition of sovereignty", which is defined in the "shared presumptions" of various branches of the federal government. The Ninth Circuit would have had to have found that there is no such "tradition of sovereignty" over non-members.

The *Montana* Court stated that inherent sovereign powers of Indian tribes do not extend to non-members except in two situations. The Ninth Circuit erred by seizing upon these exceptions and molding them into the "rule". It disregarded the very framework of these exceptions and gave the second *Montana* exception (regarding situations which threaten the existence of the tribe or livability of a reservation) such an expansive reading so as to negate significant remaining language in the *Montana* opinion.

Furthermore, the Ninth Circuit applied the federal pre-emption test in an erroneous manner. The question is whether any specific federal legislation gave the Yakima Tribe jurisdiction over non-members, thereby pre-empting state or county jurisdiction. Federal pre-emption must be found in a comprehensive federal scheme in a particular field. Only after such federal pre-emption is found can there be any balancing of state interests against Indian interests. The Ninth Circuit made only a cursory examination of such a federal regulatory scheme and could only come up with general legislation on various disparate subjects. It erroneously held such marginally related legislation pre-empted state jurisdiction over non-members. It then prematurely went on to balance the interests of the Yakima Nation with those of the county. The Ninth Circuit further erred in that the court only balanced a myopic version of county interests. It disregarded present and future county interests beyond the specific proposed uses of Brendale and Wilkinson.

In contrast to the Ninth Circuit's strained attempt to find federal pre-emption, it chose to simply ignore the federal legislation (i.e., General Allotment Act of 1887, 24 Stat. 388) which indicated an affirmative attempt to *preclude* tribal regulation of non-members. The General Allotment Act was addressed in great detail in *Montana*, which found from it a congressional assumption that tribes did not have and should never have jurisdiction over non-members.

Finally, by ignoring precedent and the United States Constitution, the Ninth Circuit placed non-members under a regulatory system that is not subject to all the constraints of the United States and under which they have no representation. In effect, it incongruously deprived

United States citizens of constitutional protections, but yet granted Indian tribes power inconsistent with the tribe's dependent status on the United States.

Zoning, if too restrictive, could constitute a taking of the use of non-member land. However, under *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), such non-members can not gain compensation from the tribal government for such a taking.

ARGUMENT

I. THE YAKIMA NATION DOES NOT HAVE INHERENT CIVIL JURISDICTION OVER NON-MEMBERS LIVING ON FEE LANDS WITHIN THE YAKIMA RESERVATION.

A. The Ninth Circuit Misinterpreted the *Montana v. United States* Decision and Ignored Vital Precedent.

The Ninth Circuit, as well as some other post-*Montana* courts and Indian tribes all over the nation, seized upon certain wording in this Court's *Montana* opinion and turned the general analysis of that opinion on its head. Instead of starting with the premise that tribes in general were divested of their jurisdiction over non-Indians, the Ninth Circuit and various tribes assume the existence of such jurisdiction and put the burden on non-Indians to prove why such jurisdiction should not exist. That kind of analysis ignores the thrust of *Montana*, and a host of very real practical problems have resulted and will result if the Ninth Circuit is not corrected.

Montana dealt with the same kind of question as is in this case: whether a tribe has the power to regulate civil activities by non-members on fee land within a reservation. Ultimately the court said that no such tribal power existed. The primary analysis of *Montana* also addressed the issue presented in this case: whether inherent tribal sovereignty was an appropriate basis on which to find tribal power over non-members. As in *Montana*, there is

little real argument here that some particular treaty or statute gave the Yakima nation the power to regulate, control fee land development, and ultimately punish non-members in a civil law context.

The framework which guided the *Montana* court's analysis was the framework set out in *United States v. Wheeler*, 435 U.S. 313 (1978), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Both the *Wheeler* and *Oliphant* cases discussed the issue of tribal authority over non-members in detail. *Wheeler* concluded that by virtue of their original incorporation into the United States, tribes lost some of their original attributes of sovereignty, including "those involving the relations between an Indian tribe and non-members of the tribe." 435 U.S. at 326. In citing *Oliphant*, the *Montana* court concluded that "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities on non-members of the tribe." 450 U.S. at 565.

Oliphant and *Wheeler* have been followed consistently and are good law. They remain as the most extensive analyses of the thorny questions of tribal jurisdiction over non-Indians. No decision in the present case can be made without a serious review of the reasoning of those cases. The Ninth Circuit made no attempt at such review. If it had, it would have had to recognize the reduced reliance that modern courts should give to "platonic notions of Indian sovereignty" and the increased importance of analyzing jurisdictional issues in terms of applicable federal treaties and statutes. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). It would also have had to analyze Yakima's powers over non-members in terms of the tradition of its sovereignty, which in turn was defined by the "shared presumptions" of the various branches of the federal government. *Oliphant*,

435 U.S. at 206. *See also Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 153 (1980).[1] The Ninth Circuit further would have had to acknowledge that the tradition of sovereignty, or shared presumptions of the branches of the federal government, all pointed to the fact that tribal jurisdiction over non-members was almost universally denied, that until recently few tribes even had court systems, and that no congressional action has granted tribes civil power over non-members. *See, e.g., Oliphant*, 435 U.S. at 201-06.

Finally, had the Ninth Circuit recognized *Oliphant* and *Wheeler*, it would have considered the rights of non-members to be protected from a regulatory system that might have no relationship with the United States Constitution or commonly accepted principles of American procedural and substantive justice. The Supreme Court has readily acknowledged that tribal governments and judicial systems "are in many ways foreign to the constitutional institutions of the federal and state governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978). Tribal governments and court systems also are not subject to the constraints of the United States Constitution. *Id.* at 56. Even under the Indian Civil Rights Act (25 U.S.C. §§ 1301-1303), which does not incorporate all constitutional protections, there is no civil law remedy for violations—only the remedy of habeas corpus is available. *Id.* at 65, 72.

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[1] The analysis of "inherent authority" recommended by Mr. Justice Rehnquist in the *Washington* case (447 U.S. 134, 176-90) is appropriate. Such an approach entails examining the "tradition of sovereignty" with regard to the tribal regulation of non-members on non-member lands. The tradition would indicate that tribal regulation of non-members on fee lands has not been historically accepted or exercised. After the "tradition" has been examined, it will be appropriate to review relevant treaties and statutes to determine whether Congress expressly altered that tradition. If Congress did not so alter the tradition, then the courts should not grant the tribe civil jurisdiction over land use by non-members on fee lands.

The *Oliphant* decision reviewed the history of the reasons for traditional lack of authority over non-members and concluded:

> But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizents be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H.R. Rep No. 474, 23d Cong., 1st Sess., at 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

Oliphant, 435 U.S. at 210. The powers of a tribe to confiscate property, to severely restrict the use of private fee land, to restrict freedom of movement over territory that is not Indian owned, and to punish non-members with fines or even arrest (as in, for example, civil contempt proceedings) are precisely the potential "intrusions on [non-members'] personal liberty" that the *Oliphant* court determined were given up by tribes "except [to be exercised] in a manner acceptable to Congress." *Id.* at 210.

Indeed, various Indian Tribes recognize this power, and have provided for it in their laws and ordinances. The Cheyenne River Sioux Tribe Tribal Rights Employment Ordinance provides for the seizure and sale of construction equipment to pay due excise taxes and penalties. The Aquatic Lands Conservation Ordinance of the Confederated Salish and Kootenai Tribes of the Flathead

Reservation calls for civil penalties of between twenty-five dollars ($25.00) and five hundred dollars ($500.00) for each day the violation of the ordinance continues to exist. Finally, the Intertribal Court of Appeals, in *Crow Creek Sioux Tribe v. Buum*, 10 Indian L.Rep. 6031 (Intertribal Ct. App. 1983), expressly held tribes have the power to enforce court orders through civil contempt proceedings.

Because potential intrusions on liberty are labelled "civil" rather than "criminal" does not mean that the intrusions are any less onerous. One who sits in jail for civil contempt sits in the same jail as does one who violates tribal criminal law. In fact, given the expansive reading given the term "civil-regulatory" in recent cases such as *California v. Cabazon Band of Mission Indians*, —— U.S. ——, 107 S.Ct. 1083 (1987), it would seem that even the *Oliphant* type of direct intrusions on personal liberty (*e.g.*, incarceration) could be the result of civil-regulatory jurisdiction by tribes over non-members.

Nor does it make any difference that after more than one hundred years many (but certainly not all) tribes have court systems and at least some written laws or ordinances. Until and unless Congress specifically returns it, the tribes have lost their power to regulate non-members on fee land because that power is "inconsistent with their status." *Oliphant*, 435 U.S. at 208. The return of jurisdiction over non-members must be specific because it is so fundamentally important. It is absurd to find such power by implication (as the Ninth Circuit hints in this case below) from statutes such as the Indian Financing Act of 1974 or the Indian Child Welfare Act of 1978. *See* 828 F.2d at 533.

The United States government has a paramount sovereign interest in making sure that the constitutional institutions of the federal and state governments are made available to its non-Indian citizens. This is especially true because this United States government was responsible for opening up reservations and inviting non-Indians to reside thereon. Justice White, in his dissent in the *Santa Clara Pueblo case*, quoted the purpose of the congressional Indian Civil Rights Act as being "to insure that the American Indian is afforded the broad constitutional rights secured to other Americans." 436 U.S. at 72. The Ninth Circuit's ruling in this case has the peculiar result of interpreting federal statutes and law so as to *remove* those constitutional rights from those "other Americans" who Congress (and the Court) assumed were fully and properly protected.

The *Oliphant* court as well as earlier courts recognized the dangers of subjecting people of one sovereign to the courts of another. *Oliphant* cited the early case of *Ex parte Crow Dog*, 109 U.S. 556 (1883), as an example. *Ex parte Crow Dog* involved the question of whether, prior to the Major Crimes Act, federal courts had jurisdiction over offenses by Indians against Indians on reservations. The Court refused to extend federal jurisdiction saying that, without statutory mandate, the United States was trying to extend its law:

> by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . .; which judges them by a standard made by others and not for them. . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception. . . .

109 U.S. at 571, quoted in *Oliphant*, 435 U.S. at 210-11. The above words could have been written with reference to the present case.

The Ninth Circuit misread the main emphasis of *Montana*, ignored *Oliphant* and *Wheeler*, and disregarded the

constitutional protections to which non-members of a tribe are entitled. This Court should correct the Ninth Circuit's reasoning, much as it had to do in *Montana*, *Wheeler*, and *Oliphant*.

B. The General Allotment Act and Other Laws Opening Up the Reservations to Non-member Settlement Restricted Any Authority the Tribe Might Originally Have Had Over Non-members.

The *Montana* decision teaches that the general rule in matters such as the present one is that notions of "inherent sovereignty" do not give tribes jurisdiction over non-members. That should also be the starting point in the present case.

The next question should be whether the Ninth Circuit could identify any specific federal legislation which gave the Yakima tribe jurisdiction over non-members. The Ninth Circuit could identify no such legislation. The best it could come up with is citation to general legislation encouraging tribal governments *in programs involving their members* in areas such as child welfare, education, and financing. Such statutes are so marginally related to the present issue as to be of virtually no assistance.

The final question is an analysis of the Yakima issue should be whether any federal legislation has indicated an affirmative intent to *preclude* tribal regulation of non-members. The Ninth Circuit ignored this inquiry. The *Montana* court, however, addressed this question in detail. The court found that the General Allotment Act of 1887 (24 Stat. 388) and subsequent allotment acts which opened up reservations demonstrated a congressional assumption that tribes did not have and should never have jurisdiction over non-members. These congressional enactments, which encourage and enabled non-members to move on to reservations, form the correct backdrop against which to analyze questions such as those posed in the present case.

The *Montana* court discussed the federal allotment acts in detail, holding that even if prior treaties had preserved some tribal jurisdiction over non-members, the allotment acts removed such jurisdiction. In an extensive footnote detailing its reasons for that conclusion, the *Montana* court said in part:

> The policy of the Acts was the eventual assimilation of the Indian population [citation omitted] and the "gradual extinction of Indian reservations and Indian titles." [citation omitted] The Secretary of the Interior and Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal relations. . . .
>
> *There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority.* Indeed, throughout the Congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. [citations omitted] *It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction* when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana, 450 U.S. at 559-60 n.9 (emphasis added).

There was no Yakima jurisdiction over non-members when the reservation was allotted and when non-members became fee owners within the reservation, and there is no Yakima jurisdiction today. No federal enactment has granted such jurisdiction to the Yakima nation in the face of the congressional policy which allowed the reservation to become allotted in the first place. The Ninth Circuit cannot change that history or congressional policy. As the Supreme Court has stated on more than one occasion, "[o]ur task here is a narrow one. . . . [W]e cannot remake history." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977).

C. The Ninth Circuit Expanded Montana's Exceptions Far Beyond Their Intent and Meaning.

In this case, the Ninth Circuit took what the *Montana* court stated to be exceptions to a general rule, and turned those exceptions into a general rule. Neither logic nor precedent support what the Ninth Circuit did.

The *Montana* court stated clearly "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. It then, however, recognized two special situations where the general rule could be altered. First is when non-members choose to become involved with a tribe by entering "consensual relationship." Presumably the non-member has a choice about whether he wants to deal with a tribe, and therefore can refuse to become a subject to tribal regulation by ending his consensual (usually commercial) relationship.

Such is not the case with non-members living on reservations who have not made any "consensual" commercial relationships with a tribe. The *Montana* court acknowledged that at some level an activity of a non-member could become so onerous as to threaten the very existence of a tribe or livability of its reservation. In such a situation, the court acknowledged that a tribe could act to protect itself. However, such a situation had to be extremely serious and was clearly an exception to the general rule. Where the Ninth Circuit went astray was when it took *Montana's* language and interpreted it as encompassing virtually any activity over which a government can exercise traditional police power.[2] Police power

[2] The district court in the *Whiteside* case went so far as to identify perceived threats to a tribe's "cultural" and "spiritual" values as sufficient to justify tribal authority over non-Indians. 617 F.Supp. at 744. Such a reading of the Montana exception is sufficient to bring just about any conduct within the exception's terms, thereby virtually eliminating the general rule.

authority (used to promote the "general welfare") is incredibly broad, and goes far beyond situations which threaten the existence of a tribe or livability of a reservation. It makes no sense to give the *Montana* exceptions such an expansive reading because to do so would negate the *Montana* court's preceding extensive discussion of *Oliphant*, *Wheeler*, and the allotment acts.[3]

The proper interpretation of *Montana* is that tribal civil authority over non-members is precluded unless the tribe can prove that a particular activity is so onerous as to threaten its own or its reservation's existence. The Yakima nation did not, and could not, demonstrate this in the present case. The activities of non-members of the tribe are not unregulated. They are subject to state and local government regulations, constrained by principles of substantive and procedural due process, and subject to tribal action if they are particularly onerous. This Court

[3] The *Montana* court's citations to previous authority in support of its identified exceptions certainly do not support the Ninth Circuit's overbroad reading. The *Montana court*, 450 U.S. at 566, cited *Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee*, 358 U.S. 217 (1959); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); and *Thomas v. Gay*, 169 U.S. 264 (1898). In *Fisher* the court dealt with a private legal dispute involving only Indians. In *Williams* the issue was jurisdiction over a private legal dispute between a non-member and a reservation Indian. In Montana Catholic Missions the court actually upheld state taxation of cattle owned by non-members in the face of argument that such taxation would really be against Indians and should not be allowed. No claims of tribal jurisdiction were made or ruled upon. The *Thomas* case was also concerned with state taxation of cattle belonging to non-members on leased Indian land. Such a state tax was upheld. Again there were no issues involving tribal jurisdiction over non-members.

The fact that *Montana* cited only cases that either upheld state jurisdiction or involved interaction with tribal members emphasizes the point that tribal jurisdiction over non-members who are not directly involved in disputes with tribal members is an exceptional event.

should clear up the Ninth Circuit's misreading, and should re-emphasize the past reasoning and understanding of the branches of the federal government when analyzing the reglationship between tribes and non-members living on fee lands.[4]

II. IF TRIBAL AUTHORITY IS FOUND TO EXIST OVER NON-MEMBERS, THE STATE AND COUNTY MUST ALSO HAVE SUCH AUTHORITY.

If the Yakima nation is found not to have civil authority over non-members, the issue of concurrent jurisdiction (or pre-emption thereof) need not be addressed. It has traditionally and consistently been held that in general a state has jurisdiction over non-Indians *anywhere* within the state's territory, even within Indian reservations. *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930); *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881). As was summarized in Cohen's original *Handbook of Federal Indian Law* (1942) at 121:

> The mere fact that the focus of an event is on an Indian reservation does not prevent the exercise of state jurisdiction where the parties involved are not Indians and the subject matter of the transaction is not of federal concern.

In order for state or county jurisdiction over non-members to be removed it must be shown either (1) that the federal government has evidenced an intent to remove the state's jurisdiction (*White Mountain Apache Tribe v. Bracker*), 448 U.S. 136 (1980)) or (2) that the exercise

[4] It is important not to confuse tribal jurisdiction over non-members who have no relationship with the tribe with tribal jurisdiction over disputes between members and non-members, or tribal jurisdiction over the activities of its members. There are stronger reasons (and more lenient tests) for finding jurisdiction when tribal members or tribal land are involved than there are when only non-members are involved.

of state jurisdiction somehow so severely interferes with the right of reservation Indians to make their own laws and be ruled by them that such jurisdiction should be disallowed (*Williams v. Lee*, 358 U.S. 218 (1959)). The Ninth Circuit once again misinterpreted these tests in pre-empting county jurisdiction in the "closed" reservation area.

The Ninth Circuit erred in applying the federal pre-emption test as discussed in the cases of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980). The *Bracker* and *Central Machinery* cases do not present a simple "balancing of interests" test and nothing more, as the Ninth Circuit implies. Rather, both of those cases make clear that federal pre-emption must still be found in a comprehensive federal statutory and regulatory scheme, even if the classic requirement of an express statement of intent to pre-empt is not necessary. It is only *after* a comprehensive federal scheme *in a particular field* has been found that an analysis of any competing state interests is required—and then only to see if the state interest is so strong as to overcome the implicit federal pre-emption. Again it must be emphasized that authority over *non-members* is at stake here, which makes it different than an analysis which deals with activities involving member Indians.

The Ninth Circuit engages only in the most cursory examination of a specific federal regulatory scheme. Rather, it cites general federal statutes such as the Indian Financing Act of 1974 and Indian Child Welfare Act of 1978. 828 F.2d at 533. The court apparently concludes that these statutes constitute a comprehensive scheme for land use management for it then goes directly to a balancing of interests test. No attempt is made to support a conclusion, such as was made in *Bracker*, that:

> the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal

> timber, where a number of the policies underlying the federal regulatory scheme are threatened. . . .

448 U.S. at 151. The Ninth Circuit apparently has concluded that general recent federal Indian legislation on various disparate subjects has in effect pre-empted state jurisdiction over non-members in all areas—without the necessity of proving comprehensive federal (as opposed to tribal) involvement. Such a conclusion is at odds with a great deal of precedent. Such a conclusion eliminates—without congressional consideration—almost all state or county jurisdiction over non-members on reservations. Such a conclusion should not be accepted by this Court.

Error was also committed below when the Ninth Circuit analyzed the potential county interest in zoning matters—an analysis which should only come into play if the court has found a comprehensive framework of federal statutes and regulations. It must be remembered that the county interests go beyond the specific proposed uses by Brendale and Wilkinson. The Yakima nation is concerned with land uses that may spill over from the fee land to affect the remaining reservation land. The county has a similar long range concern that the reservation not allow development on fee land that would spill over to affect non-reservation county land. The issue for the county goes beyond the specific uses proposed by defendants in these cases. The county's authority will not disappear or reappear depending on the specifics of a future proposal. If this Court upholds the Ninth Circuit, the county's authority is likely gone forever and as to all future proposed uses of reservation fee lands.

The most reasonable way to protect future county concerns is to also preserve county authority over reservation fee land. The Ninth Circuit ignored legitimate future county concerns when it focused only on current proposals by Brendale and Wilkinson. The court's error should not be allowed to continue.

The second barrier to state or county jurisdiction was not discussed much by the Ninth Circuit, probably because it does not apply to the present situation. *Williams v. Lee*, 358 U.S. 217 (1959), a case involving a legal dispute with a reservation Indian, stands for the rule that state jurisdiction over such conflicts with tribal Indians cannot exist when it would severely interfere with the right of reservation Indians to make their own laws and be governed by them. County jurisdiction in the present case does not affect the Yakima nation's ability to pass laws governing its own members and their conduct. County jurisdiction relates only to the activities of non-members which takes it out of situations such as those addressed in the *Williams* case. Any other interpretation would make the *Williams* test unnecessary—the court would have ruled that any state jurisdiction is prohibited because it, of necessity, would involve regulation of some kind of on-reservation conduct. No such rule has been adopted. Since jurisdiction in the present case involves only non-members, it does not fall victim of the *Williams* test.

III. ZONING BY THE TRIBAL GOVERNMENT OF LAND OF NON-MEMBERS WHO ARE UNREPRESENTED IN SUCH GOVERNMENT AFFECTS FUNDAMENTAL CONSTITUTIONAL RIGHTS.

Mindful of not getting the "cart before the horse", it is nevertheless important at this juncture to at least address the fundamental constitutional rights potentially affected by the zoning powers of governmental units. *Oliphant*, 544 F.2d 1007, 1019 (1976) (Kennedy, J., dissenting). Since voting in tribal governments is limited to tribal members, the power and the rights involved must be closely scrutinized by this Court.

The power to zone is derived from the state's police power to promote the public health, safety, morals and welfare. 8 McQuillin, *Municipal Corporation*, § 25.34,

p. 81 (3rd ed. 1983). Also, *see generally* 1 Anderson, *American Law of Zoning* (3rd ed. 1986). When authorized by the state constitution, a specific statute or general enabling legislation, zoning powers of the state may be delegated to municipalities and other political subdivisions or units of local government. The enactment of a zoning ordinance is "an exercise of legislative power residing in the state." 8 McQuillin, *Municipal Corporations* § 25.54, p. 139.

In general, zoning measures must observe fundamental guaranties of personal or property rights protected in federal or state constitutions. For example, such zoning measures must observe equal protection and due process of the laws. 8 McQuillin, *Municipal Corporations* § 25.05, pp. 12-13. "Moreover, zoning ordinances must conform and not conflict with enabling statutes or state conferred rights of eminent domain." *Id.*

Under ordinary circumstances, zoning ordinances will not be struck down unless they are discriminatory, oppressive or excessive. *See generally Nectow v. Cambridge*, 277 U.S. 183 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); 8 McQuillin, *Municipal Corporations* § 25.05, pp. 12-13.

By definition, the zoning power of a tribal government over non-members on fee lands is discriminatory in that only tribal members have a voice in that government. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). As a result, this is not a case involving inherent sovereignty, but rather it is a case of inherent discrimination. The presence of inherent discrimination makes the implication of those fundamental due process rights recognized by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. ——, 107 S.Ct. 2378 (1987), more crucial. Under the circumstances, it should also make the requests for this Court to adhere to the fundamental aspects of *Oliphant* and *Montana*, seem only reasonable.

CONCLUSION

Extremely important issues are at stake in this case. The Court has an opportunity to restore some consistency and predictability to the law of jurisdiction over non-members of a tribe within Indian country. The Ninth Circuit has erroneously interpreted Supreme Court precedent in a manner guaranteed to create more confusion and ill will in Indian country. This Court should reverse the decision in *Yakima Indian Nation v. Whiteside* and find exclusive jurisdiction within the county to impose civil land use regulations on non-member owners of fee land within the Yakima reservation.

Respectfully submitted,

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APPENDICES

APPENDIX

A. Becker County Record, Aug. 14, 1988, at 1, col. 1 and 6A, col. 1

NON-INDIANS FEAR RULING—by Bill Pond

A small band of residents living on the White Earth Reservation are deeply troubled about their futures.

They are part of the non-Native American Indian community living on the reservation, which is primarily populated by whites. But they say the White Earth's band's control could very well strip their rights under the U.S. Constitution, rights many people take for granted.

* * * *

Resort owners Jane and John Reish and Bob Bruns had dreams of owning their business and living in peace. But political relations between White Earth tribal leaders and whites are crushing their idyllic world.

* * * *

. . . White Earth Tribal Chairman Chip Wadena said that may not be the case. If precedence is set, Wadena said the tribe will not immediately adopt the footsteps of the Yakima Nation.

* * * *

. . . Today, roughly 30 percent of the population of White Earth is native American, controlling 7 percent of the land.

* * * *

. . . Wadena said if white residents chose to live on the reservation, they should be willing to live under White Earth jurisdiction.

"There is nothing that holds them here. Our tribal government does have autonomy. They have to understand there is a different government here," Waldena said.

* * * *

B. Detroits Lakes, Apr. 14, 1988, at 1A, 10A

CONTROVERSY OVER FISHING RIGHTS HEATS UP—by James Campbell

Tempers are flaring after the public announcement last week of the 1988 White Earth Reservation tribal fishing regulations.

While the general fishing regulations—which among other things allow tribal members to take a daily catch of 10 each of walleyes, northerns, bass and trout; one muskellunge; 30 crappies; 100 sunfish; and 200 roughfish —are unpopular, they are unchanged this year from last year.

But an experimental spring gamefish spearing season the reservation has instituted for this year is a source of new controversy.

* * * *

C. Daily Press, North Wisconsin's Morning Newspaper, July 1, 1988, at 1, col. 1

4 INDIANS CLAIM TIMBER RIGHTS—Two Bands Place Moratorium on Treaty Lumbering

SIREN (AP)—Four Chippewa tribal members, citing Indian treaty rights, want to harvest timber on four tracts of land open for a Burnett County sale, but the county said Thursday the sale will go on as planned.

Meanwhile, two Chippewa bands have passed resolutions placing a moratorium on harvesting timber off-reservation under treaty rights.

"I've been concerned about this for years," said Charles Tollander, Burnett County board chairman.

He sent a letter Thursday to each of the four members of the Lac du Flambeau band, saying the tribal members could be cited for timber theft if they took the timber without following state and local regulations.

* * * *

D. Letter from Ann Schoenborn, Co-Chairperson, United Township Associations to Mr. Robert Gleason (Aug. 12, 1983) (discussing White Earth Tribe)

* * * *

1. To obtain a true picture of the legal status of all people living within the boundaries of an open reservation like White Earth, a division of the people must be made. The division is Tribal member and Non-Tribal member.

Tribal members are citizens of the White Earth Tribe, United States, State of Minnesota, and respective County, Township, or City in which they reside. As citizens of these governmental bodies they have the right to run for office, elect officials, have a voice in the formation of laws and assessment of taxes, and partake in any services available. They also have one other unique right. That is the right to discriminate against any person on the basis of race. This is most prevelant in the case of hiring practices.

Within any governmental organization the rights of an individual go hand in hand with a responsibility to maintain that organization. Here is where a major division within Tribal members occurs. A Tribal member living and working within reservation boundaries pays no state income taxes while a Tribal member either living or working or both off the reservation pays state income tax like any other Minnesota resident. The responsibility for supporting local services is non-existent for members living in mobile homes or on Tribal land as they do not pay real estate taxes. . . .

Non-Tribal members include all other people of other races and people with Indian heritage who by choice or other Tribal background are not Tribal members. Non-Tribal members make up 70% of the residents of White Earth. This group of people are citizens of all the aforementioned governmental bodies except Tribal. They are financially responsible for all these governmental bodies

including Tribal, without having all of their basic rights. . . .

* * * *

. . . An example to demonstrate this dilemma would be a local White Earth businessman. If this person, say a retailer, sells to a Tribal member he now has a consensual relationship. If on the other hand he chooses to not sell to Tribal members he now threatens the economic security or the health or welfare of the Tribe. Either way he stands in a position of being licensed and regulated by a group in which he has no choices. This example can be applied to grocers, gas stations, hardware stores, bait dealers, resorters and farmers, to name a few.

* * * *

In our meeting with Mr. Rick Neal we asked to have the U.S. Commission on Civil Rights be directed to study and collect information and appraise Federal laws and policies with respect to discrimination of non-Tribal members living on open reservations. Mr. Neal said this could be Step 2 if necessary.

* * * *

E. Letter from David Rasmussen, Game Warden, Minnesota Dept. of Natural Resources to State of Minnesota (May 5, 1988) enclosing Letter from John M. Sieling, Chief Deputy, Becky County, Minnesota to David Rasmussen (April 28, 1988)

* * * *

. . . Due to the fact that the White Earth Indian Reservation decided to open up legalized spearing of game fish during the spawning season, we felt that a number of concerned residents that lived within the reservation were upset about the events that had taken place in the past with the trespassing and they anticipated more incidents this year.

* * * *

Several of our officers that patrolled the reservation during the spearing season have advised me that the situation up there was very tense in regards to the tribal

members that were spearing on the reservation and with the land owners that own property on the reservation itself. . . .

* * * *

EE. Map of Flathead Lake, Flathead Reservation, Montana by Dept. of Interior (March 20, 1915), denotes "Boundary of *Former* Flathead Indian Reservation"

F. Aquatic Lands Conservation Ordinance No. 87-A of the Council of Confederated Salish and Kootenai Tribes

AQUATIC LANDS CONSERVATION ORDINANCE—BE IT ENACTED BY THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES that:

* * * *

PART II—FINDINGS AND POLICY

Section 1. Findings.

The Tribal Council finds that:

a. The self-governing capabilities, political integrity, health and welfare, and economic security of the Tribes will be protected and enhanced by Tribal governmental control, regulation and protection of aquatic lands which are critical for the perpetuation of Reservation fisheries and wildlife, the preservation of Reservation water quality, and the maintenance of the health, safety and welfare of Tribal members and thereby of all persons residing on the Reservation.

b. The Treaty of Hellgate July 16, 1855 (12 Stat. 975) reserved to the Confederated Salish and Kootenai Tribes (hereinafter the "Tribes") the exclusive right to hunt and take fish within the exterior boundaries of the Flathead Reservation.

* * * *

m. "Reservation waters" means:

(1) all naturally occurring bodies of water within the exterior boundaries of the Reservation regardless of al-

teration by man, including but not limited to lakes, rivers, streams (including intermittent streams), mudflats, wetlands, sloughs, potholes and ponds from which fish and wildlife are or could be taken, but does not include wholely manmade water bodies.

(2) tributaries of waters identified in subpart (1) above;

(3) wetlands adjacent to Reservation waters.

* * * *

G. Glacier Reporter, December 12, 1985 at 9, 10 (Proposed Blackfeet Comprehensive Tax Code)

BLACKFEET COMPREHENSIVE TAX CODE
Of the Blackfeet Tribe of the
Blackfeet Indian Reservation—October, 1985

* * * *

Section 1.1 Statement of Purpose.

The Blackfeet Tribal Business Council of the Blackfeet Indian Tribe hereby enacts this Blackfeet Tribal Tax Code for matters regarding assessments and collection of taxes imposed by the Tribe, in furtherance of its policy of assuming, to whatever degree permitted by the Constitution, laws and treaties of the Blackfeet Tribe, and by the Constitution, laws and treaties of the United States of America, governmental control over property, persons and business activities within the exterior boundaries of the Blackfeet Indian Nation. Tax revenues collected pursuant to this Code are to be used to provide governmental services which improve the health and welfare of both members and non-members of the Tribe residing within the boundaries of the Blackfeet Nation. To finance and strengthen these tribal governmental policies, the Blackfeet Tribal Business Council of the Blackfeet Indian Tribe hereby adopts and incorporates the ordinances set forth as Chapters, Sections or Provisions, in this Code, as well as any subsequent tax ordinances and amendments thereto which the Business Council of the Blackfeet Tribe may, from time to time, deem necessary and proper.

* * * *

H. Great Falls Tribune, April 11, 1987 at 12(A) (discussing Blackfeet 4% possessory tax)

* * * *

The Blackfeet Tribe's 4 percent possessory tax on oil companies, railroads, utility firms and rural cooperatives is a bad idea—from start to finish. It may be discriminatory and, at least in the early phases, it disregarded the interests of people and companies that were affected.

* * * *

The possessory tax was passed by the Blackfeet Tribal Council on Dec. 30, to take effect two days later, with little advance notice and no public hearing. Tribal officials said the tax was necessary to maintain essential reservation services—such as health programs, the tribal court and the community college.

* * * *

The BIA has approved the proposed tax. But Marlenee has asked Interior Secretary Donald Hodel for a moratorium on new tribal taxes on non-Indian interests while his legislation is pending.

* * * *

I. Great Falls Tribune, at 1A (discussing Blackfeet 4% possessory tax)

TRIBAL TAX WINS APPROVAL
OF FEDERAL AGENCY
By The Associated Press and Tribune Staff

BILLINGS—The Bureau of Indian Affairs has approved a 4-percent tribal tax on utilities, railroads and oil and gas companies that cross the Blackfeet Indian Reservation.

* * * *

The Blackfeet tax was the second tribal tax approved in Montana this year. Earlier, a 3-percent tribal tax was imposed on the Fort Peck Indian Reservation.

The tax took local businesses by surprise when a newspaper advertisement in January informed them the tax due by March 23. The tribal business council had passed the measure without hearings at the end of 1986.

* * * *

Glacier County officials opposed the tax, saying they fear it will spark a major financial crisis if the affected utilities protest their taxes. County Attorney James C. Nelson said the protests could tie up tax revenue for years and force the county to reduce its services.

* * * *

J. Letter from Lee Jacobsen, Secretary of East Slope Taxpayers Association of August 16, 1988, to "whom it may concern" (Aug. 16, 1988)

* * * *

Jurisdiction problems have all but stopped lending agencies and insurance companies from doing business here. The oil companies have pulled out and new drilling is at a minimum. The $300.00 business tax is now at $1,000.00 for anyone who sells liquor on the Blackfeet Reservations, control of sale of tax free cigarettes and gambling is also strictly under tribal control.

The threat of carrying out the letter of the tax ordinance is making lots of farmers and ranchers and Ag Business Associates very wary. The economy is very bad and so much time and money spent on trying to prevent more problems exist such as this legal brief.

* * * *

K. West Valley Watch, Inc., Aug. 17, 1988 (discussing Confederated Tribes of Grand Ronde)

SENATE CLEARS GRAND RONDE
TRIBAL MEASURE
By George Robertson

Even though the U.S. Senate last week approved a bill creating a 9,811-acre reservation for the Confederated Tribes of Grand Ronde some opponents are still hoping President Reagan will kill the measure.

* * * *

Kathy Thole, a Grand Ronde business owner who has opposed the bill, said if Reagan signs it she might seek a preliminary injunction in the federal courts to prevent the measure from being enacted.

* * * *

L. Albuquerque Journal, Aug. 31, 1983, at A-a, A-3 (discussing Sandia Pueblo)

PUEBLO ASKS RETURN OF
9,000 ACRES IN SANDIAS
By Nolan Hester, Journal Staff Writer

Sandia Pueblo is seeking the return of almost the entire northern half of the Sandia Mountain Wilderness, claiming it has uncovered a surveying mistake that dropped approximately 9,000 acres from the pueblo's original Spanish land grant.

Tribal officials have asked Rep. Bill Richardson, R-N.M., to introduce federal legislation allowing the transfer—which would include land beneath the Sandia Crest transmission-tower site, the Sandia Peak Tramway, the Juan Tabo picnic area and approximately 100 homes in the nothern foothills.

* * * *

M. Cheyenne River Sioux Tribe Ordinance No. 42a

Section 1: Declaration of Policy

As a guide to the interpretation and application of this Ordinance, the public policy of the Cheyenne River Sioux Tribe is declared to be as follows:

* * * *

Indians have unique and special employment, subcontract and contract rights and the Cheyenne River Sioux Tribal Government has the inherent sovereign power to pass laws to implement and enforce those special rights on behalf of Indians. . . .

* * * *

C. "Covered Employer" means any employer employing two or more employees who during any 30-day period, spend, cumulatively, 40 or more hours performing work within the exterior boundaries of the Cheyenne River Sioux Reservation.

* * * *

Section 3: Indian Preference in Employment

All covered employers, for all employment occurring within the exterior boundaries of the Cheyenne River Sioux Reservation, shall give preference to qualified Indians, with the first preference to local Indians, in all hiring, promotion, training, layoffs, and all other aspects of employment. Such employers shall comply with the rules, regulations, guidelines and orders of the Cheyenne River Sioux Tribal Employment Rights Commission which set forth the specific obligations of employers in regard to Indian preference and local Indian preference. These requirements shall not apply to any direct employment by the Cheyenne River Sioux Tribe . . .

* * * *

A. Every covered employer with a construction contract in the sum of $50,000.00 or more shall pay a one-time fee of 1% of the total amount of the contract. . . .

B. Every covered employer, other than construction contractors, with twenty (20) or more employees working on the Cheyenne River Sioux Reservation, or with gross sales on the Cheyenne River Sioux Reservation of $50,000 or more shall pay a quarterly fee of 1% of his employees quarterly payroll which shall be paid within 30 days after the end of each quarter.

* * * *

N. 53 Fed. Reg. 20, 179 (1988)

Bureau of Indian Affairs

Cheyenne River Sioux Tribe of South Dakota;
Ordinance Amending Alcohol Beverages Control Law

* * * *

Sec. 1-1-1. *Statement of Purpose.* The purpose of this Alcoholic Beverages Control Law is to regulate the activities of the manufacture, distribution, sale and consumption of liquor on the Cheyenne River Sioux Reservation. Any person desiring to engage in the possession, sale, trade, transport or manufacture of alcoholic beverages on the Cheyenne River Sioux Indian Reservation shall comply with the rules and regulations set forth in this Alcoholic Beverages Control Law. This Ordinance shall be cited as the "Cheyenne River Sioux Alcoholic Beverages Control Law" and, pursuant to the constitutional and inherent sovereignty of the Cheyenne River Sioux Tribe, shall be deemed an exercise of the Tribe's powers for the purpose of protecting the welfare, health, peace, morals and safety of all people residing on the Cheyenne River Sioux Reservation.

* * * *

O. Draft of By-laws of Cheyenne River Sioux Tribe (Dec. 23, 1935)

* * * *

BYLAWS OF THE CHEYENNE RIVER SIOUX TRIBE OF SOUTH DAKOTA

* * * *

Article V Section 1

* * * *

(c) This court shall have jurisdiction over all Indians upon the reservation and over such disputes or lawsuits as shall occur between Indians on the reservation or between Indians and non-Indians where such cases are brought before it by stipulation of both parties provided that jurisdiction over Indian employees of the Indian Service shall be subject to rules and regulations prescribed by the Secretary of the Interior.

* * * *

P. Complaint of Cheyenne River Sioux Tribe v. Farmers Union Oil, Lester Starr (July 25, 1988)

* * * *

III. The defendant operates a liquor establishment within the exterior boundaries of the Cheyenne River Sioux Reservation without the appropriate tribal business and liquor licenses in violation of Ordinance No. 1, governing tribal business license and in violation of Ordinance No. 48, the Alcoholic Beverages Control Law.

* * * *

WHEREFORE, Plaintiff requests judgment as follows: 1. Adjudging that the defendant is subject to the jurisdiction of the Cheyenne River Sioux Tribe. 2. That defendant herein is in violation of Ordinance No. 1 for the failure to secure the appropriate tribal business license. 3. That Defendant herein is in violation of Ordinance No. 48 for the failure to secure the appropriate tribal liquor license. 4. Plaintiff requests to the courts for injunctive relief in the form of closing down said establishments owned by the defendant until such time as defendant has secured the appropriate business and liquor license from the Cheyenne River Sioux Tribe.

* * * *

Q. Letter from Wayne Ducheneaux, Chairman of Cheyenne River Sioux Tribe to Mr. Green, Mayor of Dupree (Feb. 12, 1988) with Resolution No. E. 52-88-CR attached

* * * *

Dear Mr. Green:

Please find enclosed the above referenced resolution detailing sanctions adopted by the Cheyenne River Sioux Tribe which are directed towards the cities of Timber Lake and Dupree. . . .

* * * *

. . . The economic sanctions will not only affect your local banks and grocery outlets but, also, includes the businesses therein.

The Tribe will also make a concerted effort to influence the Indian students and parents thereof into transferring said Indian students to the Cheyenne-Eagle Butte School, thereby endangering the federal and State funding received due to your large Indian student populations.

I had sincerely hoped that our government to government relationship had been one of mutual respect and concern for the citizens of our communities, but the Tribe has been met with nothing but belligerent and hostile attitudes from both governing bodies.

* * * *

R. Letter from Wayne Ducheneaux, Chairman of Cheyenne River Sioux Tribe to Kenn Pugh (June 6, 1988)

* * * *

Pugh, Kenn, A., Attorney at Law . . .

P.O. Box 6, Dupree, SD 57623

As of February 8, 1988 our records show that your business has not remitted the required 1988 business license fee for doing business on the Cheyenne River Sioux Reservation. And/or, your firm also has not filed a business application with the CRST Revenue Department.

The procedures for this delinquent business license account have been initiated with delinquent notice. The administrative procedures includes assessing a penalty of ten percent (10%) of the fee owed for each month the business license fee is not paid . . .

* * * *

. . . Should your business fail to come into compliance with tribal ordinance governing the business licensing requirements, the Bureau of Indian Affairs may be forced to implement federal law regarding the Federal Trader's licensing provisions.

* * * *

S. Letter from Congressman Sensenbrenner, Wisconsin, to Constituent (June 28, 1988)

* * * *

On June 3rd, Federal District Judge Barbara Crabb issued a decision in the continuing lawsuit over Chippewa hunting and fishing rights. This decision, in my opinion, is far worse than Judge James Doyle's landmark decision of February 1987.

Judge Crabb ruled that the Chippewa have the right to harvest *all* of the more than 175 species of animals and plants listed in the Doyle decision and that they have the right to use *all* of the harvest methods employed in treaty times and developed since then. Crabb ruled that the Chippewa have greater rights to hunt, fish and gather in the "ceded" territory than do non-Indians and that the Chippewa's rights are "paramount."

What this ruling means is that the Chippewa have the rights to all of the fish and game in northern Wisconsin and that non-Indians have no rights to them at all.

* * * *

Supreme Court, U.S.
FILED
SEP 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

(14) (13) (14)

Nos. 87-1622, 87-1697, and 87-[illegible]

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION, et al.,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, et al.,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Respondent.

ON WRITS OF CERTIORARI TO THE
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF QPOA AND S/SPAWN FOR LEAVE TO FILE AMICUS CURIAE BRIEF
(followed by proposed brief)

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Quinault Property Owners Association, Inc. (QPOA), a Washington corporation, and Salmon/Steelhead Protection and Wildlife Network, Inc. (S/SPAWN), also a Washington corporation, respectfully move the Court for leave to file the attached amicus brief in support of petitioner Wilkinson.

GROUNDS FOR MOTION

Wilkinson, a non-Indian, owns land in fee simple within the boundaries of the Yakima Indian Reservation in southern Washington. The tribe has enacted a zoning ordinance that purports to apply to all lands on the reservation, including Wilkinson's. At issue in these proceedings is whether the tribe is empowered to regulate the use of reservation land owned by non-Indians.

Movants are associations of persons similarly situated to Wilkinson, and so are interested in the outcome of these

proceedings.

QPOA is an association of approximately 300 persons, mostly non-Indians, who own land in fee simple within the limits of the Quinault Indian Reservation in northwest Washington. The Quinault Tribe, like the Yakima Nation, has adopted a zoning ordinance that purports to apply to all land within the reservation boundaries, including land owned by non-tribal members, many of whom belong to QPOA.

S/SPAWN is an association of approximately 10,000 persons and organizations interested in the proper management and regulation of Washington's natural resources, including timber, fish, and wildlife. Some of S/SPAWN's members own land in fee within the boundaries of the Yakima and Quinault reservations. As noted above, those tribes have enacted comprehensive zoning ordinances that, among other things, purport to regulate and

manage natural resources on reservation lands, whether held in fee or trust. For example, the ordinances restrict or prohibit fishing, hunting and woodcutting on certain tracts of land.

QPOA and S/SPAWN did not decide to submit an amicus brief until there was too little time to obtain written consent of the parties pursuant to Supreme Court Rule 36.2, which is why they seek leave by motion to file such brief. See Rule 36.3.

QPOA and S/SPAWN believe the arguments contained in their brief will aid the Court in deciding this case and, therefore, urge this motion be granted.

Respectfully submitted,

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ON WRITS OF CERTIORARI TO THE
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI QPOA AND S/SPAWN

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TABLE OF CONTENTS

	Page
Interest of Amici.....	1
Summary of Argument.....	1
Argument.....	2
Conclusion.....	21

TABLE OF AUTHORITIES

Cases	Page
Fletcher v. Peck, 6 Cranch 87 (1810)	9
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	21
Montana v. United States, 450 U.S. 544 (1981)	Passim
Nevada v. Hall, 440 U.S. 410 (1979)	17
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	8
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	18
Talton v. Mayes, 163 U.S. 376 (1896)	18
United States v. Mazurie, 419 U.S. 544 (1975)	7, 21
United States v. Wheeler, 435 U.S. 313 (1978)	7
Williams v. Lee, 358 U.S. 217 (1959)	21

Statutes

18 U.S.C. sec. 1161	6
25 U.S.C. sec. 331 et seq. (General Allotment Act of 1887, 24 Stat. 338)	6

Court Rules	Page
Fed. R. Civ. P. 52(a)	12

Treaties

Second Treaty of Fort Laramie, 15 Stat. 649	3
Treaty with the Yakimas, 12 Stat. 951	2-6

Other Authorities

F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.)	1

INTEREST OF AMICI

The interest of Quinault Property Owners Association, Inc. (QPOA) and Salmon/ Steelhead Protection and Wildlife Network, Inc. (S/SPAWN) is explained in the attached motion for leave to file this brief.

SUMMARY OF ARGUMENT

As a general rule, an Indian tribe cannot regulate the activities of a non-Indian on non-Indian land within the reservation, unless the activities concern a "consensual relationship" between the non-Indian and the tribe or threaten the "political integrity, economic security, or health or welfare of the tribe." Montana v. United States, 450 U.S. 544 (1981). In this case, the Court of Appeals turned the exception into the rule. It held that the Yakima Nation could regulate a non-Indian's use of non-Indian land within the Yakima reservation, despite findings by the

District Court, left unaltered by the Court of Appeals, that the non-Indian is not in a consensual relationship with the tribe and that his proposed development does not threaten tribal welfare.

ARGUMENT

There are two sources of tribal authority over non-Indians -- acts of Congress and "inherent tribal sovereignty." F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 253 (1982 ed.). These sources are discussed in turn below.

I

Congress delegates powers to tribes through treaties and statutes. The Treaty with the Yakimas, 12 Stat. 951, signed in 1855 and ratified in 1859, relinquished the tribe's claim to lands occupied by them in southeastern Washington, excepting a tract reserved for its "use and occupation." The treaty provides in Article II that the

reservation "shall be set apart * * * for the exclusive use and benefit of" the Yakimas, and that no "white man, excepting those in the employment of the Indian Department be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent." Arguably, these provisions grant the Yakimas the authority to regulate activities on all land within the reservation's boundaries. However, in Montana v. United States, 450 U.S. 544 (1981), the Court held that similar language in the treaty establishing the Crow Reservation in Montana, see Second Treaty of Fort Laramie, 15 Stat. 649, did not grant the Crow Tribe power to regulate activities -- specifically, hunting and fishing -- by non-Indians on non-Indian land within that reservation. The Court said that treaty rights with respect to reservation lands must be read in light of

the subsequent alienation of those lands under the Allotment Acts:

> "The treaty [establishing the Crow reservation], therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands. But that authority could only extend to land on which the tribe exercises 'absolute and undisturbed use and occupation.' And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. [section] 331 et seq., and the Crow Allotment Act of 1920, 41 Stat. 751. If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians."

450 U.S. at 558-59 (footnotes omitted).

In a footnote to its opinion, the Court explained that tribal regulation of non-

Indians on fee land was inconsistent with the purpose of the Allotment Acts:

> "There is simply no suggestion in the legislative history [to the Allotment Acts] that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. * * * It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. * * *"

Id. at 559, n. 9.

The Treaty with the Yakimas, like the Fort Laramie Treaty, contained assurances against non-Indian settlement on the reservation. But federal policy toward Indians changed after the treaty was signed. The Allotment Acts of the late nineteenth and early twentieth centuries,

especially the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. 331 et seq., commonly referred to as the Dawes Act, allowed large portions of the reservation to pass into non-Indian ownership. The Treaty with the Yakimas does not grant the tribe power to regulate use of those lands, just as the 1868 Fort Laramie Treaty does not grant the Crow Tribe power to regulate use of alienated land within its reservation, according to Montana v. United States, supra.

II

Statutes are the second form of congressionally delegated authority to tribes. Congress has, on occasion, passed statutes granting tribes power to regulate activities by non-Indians within reservation limits. See, e.g., 18 U.S.C. sec. 1161 (authorizing tribes to regulate sale and consumption of alcohol on reservations, including sale or

consumption by non-Indians). However, no statute authorizes tribes generally, or the Yakimas in particular, to zone land held in fee by non-Indians -- at least, the Yakimas rely on no particular statute.

III

The second source of tribal power is "inherent tribal sovereignty." The Court has long recognized that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975). However, incorporation into the United States implicitly divested tribes of many inherent powers, including the power to regulate all persons on tribal land, Indian or non-Indian. Montana v. United States, supra, 450 U.S. at 563. In United States v. Wheeler, 435 U.S. 313, 326 (1978), the Court identified the inherent powers divested and retained:

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe * * *.

"These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status."

Later cases followed the rule that inherent tribal sovereignty does not apply to non-Indians. In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the Court held that tribe has no jurisdiction over crimes committed by non-members within its reservation. And in Montana v. United States, supra, the Court held the Crow

Tribe could not prohibit hunting and fishing by non-members on reservation lands no longer owned by the tribe. The Montana Court said the principle underlying Oliphant -- that tribes possess limited power over non-members -- applied in the civil as well as criminal context. "Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." 450 U.S. at 565 (footnote omitted). This proposition is not new. In Fletcher v. Peck, 6 Cranch 87, 147 (1810) -- the first Indian case to reach the Court -- Justice Johnson wrote that Indian tribes have lost any "right of governing every person within their limits except themselves."

IV

The Montana Court recognized two exceptions to the general rule that tribes cannot regulate the activities of non-Indians on non-Indian land within reservations. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Second, "[a] tribe may * * * exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566. The Court found, however, that neither exception fit the case before it, because non-Indian hunters and anglers on non-Indian land did

not enter consensual relationships with the tribe, and because non-Indian hunting and fishing did not threaten the tribe's political and economic security, nor its health or welfare. In addition, the Court found to be relevant evidence that the State of Montana had for many years regulated non-Indian hunting and fishing on reservation lands, and that the tribe had "traditionally accommodated" itself to that regulation, Id. at 566, suggesting that tribal regulation of non-Indians is precluded by the existence of effective regulation by another sovereign.

V

As noted above, there are two exceptions to the general rule that inherent tribal powers do not extend to activities of non-Indians on non-Indian land: tribes may regulate activities of non-Indians who enter consensual relationships with the tribe, as well as activities of

non-Indians that threaten tribal political and economic security. Neither exception justifies the Yakima Nation in regulating Wilkinson's use of his land.

The first exception does not apply because there is no evidence of an agreement or dealings between Wilkinson and the tribe -- such as a lease or contract -- so as to subject him to the tribe's civil jurisdiction. 617 F. Supp., at 757.

The second exception does not apply because Wilkinson's proposed development does not threaten the tribe's political or economic security, nor its health or welfare. The District Court made the following findings of fact, which, under Rule 52(a) of the Federal Rules of Civil Procedure, must be accepted as true unless clearly erroneous:

> "10. The trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Yakima Nation. The

> proposed Wilkinson development does not threaten a food source of members of the Yakima Nation.
>
> "11. Similarly, the Wilkinson project does not threaten the economic security of the Yakima Nation. The [Nation] has not demonstrated how Yakima County's regulation of the land use of Wilkinson's 'Open Area' property in any way places its economic security in jeopardy.
>
> "12. In contrast to the 'Closed Area,' the 'Open Area' is not of unique religious or spiritual significance to the members of the Yakima Nation. The County's regulation of the Wilkinson property will not significantly infringe on those cultural values.
>
> "13. While the court is aware of the special role which land and other natural resources play in the culture of the Yakima Indian Nation, the court finds that the County's exercise of its land use regulatory jurisdiction over the subject property does not threaten those aspects of the tribal culture.
>
> "14. The Yakima Nation's political integrity will not be diminished. The County's regulation of Wilkinson's fee land will not hinder the

> Yakima Nation from exercising its regulatory jurisdiction over the trust land.
>
> "15. In sum, the court finds that Yakima County's exercise of its regulatory jurisdiction over the at-issue Wilkinson property does not threaten and will not have a direct effect on the Yakima Nation's political integrity, its economic security or its health or welfare."

617 F. Supp., at 755.

These findings, left undisturbed by the Court of Appeals, establish that Wilkinson's proposed development does not in any way threaten tribal political and economic security. That being so, the second exception to the rule limiting tribal control of non-members does not apply. Nevertheless, the Court of Appeals held that the second exception does apply. That was error.

The Court of Appeals supported its decision by noting that "[t]he Yakima Nation has alleged a number of

justifications for regulating the open area and in particular the Wilkinson property." 828 F.2d, at 535-36. What matters, however, is what the Yakima Nation proved, not what it alleged. According to the District Court, whose findings are not challenged, the tribe did not prove a threat to its political or economic security, nor to its health or welfare. Therefore, the tribe is without power to regulate Wilkinson's use of his land, under the rule discussed in Montana.

Assuming it proved a threat to tribal interests, the Yakima Nation did not also prove that regulation by Yakima County fails to alleviate the threat. As noted above, Montana suggests that effective state regulation of non-Indian activities on reservation land is a factor to consider in determining tribal authority to regulate the same activities. 450 U.S., at 566. In this case, the State of

Washington, through its subdivision, the county, regulates land use within the open area of the Yakima reservation, wherein Wilkinson's property lies. Not only does the state regulate such land, it does so effectively, or so the District Court found. Specifically, the District Court found that the county's zoning scheme is "more protective" of agricultural lands in the open area than is the tribe's scheme. 617 F. Supp., at 755. In view of this finding, which the Court of Appeals did not disturb, the real threat to tribal welfare may be replacing county zoning with tribal zoning.

VI

The Court of Appeals broadly construed the exceptions to the rule that Indian tribes cannot regulate non-member activities on fee land within reservations. There are, however, sound reasons to construe the exceptions narrowly.

First, there is no political check on tribal decisions affecting non-Indians. Typically, non-Indians have no right to participate in tribal government. They cannot vote in tribal elections, hold tribal office, or otherwise partake in tribal politics. They are, in essence, disenfranchised. The exclusion of non-Indians from tribal government delegitimizes tribal regulation of non-Indians. This nation is founded on the principle that "each sovereign governs only with the consent of the governed." Nevada v. Hall, 440 U.S. 410, 426 (1979).

Second, there is no judicial check. One attribute of sovereignty retained by tribes is immunity from suit. A tribe generally cannot be sued by non-members, at least not without the tribe's consent, see F. Cohen, supra, at 324-26, which is often withheld.

Third, there is no constitutional check. The provisions of the Constitution that

protect individual liberty and property from governmental intrusion, most notably the Bill of Rights, are, for the most part, limitations on Congress and the states. Indian tribes are not bound by these limitations, except where imposed by statute. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

In the absence of political, judicial, or constitutional checks, tribal regulation of non-members may become oppressive. Tribal zoning is particularly susceptible to abuse. It can be used as an inexpensive form of condemnation by tribes interested in reacquiring reservation land lost to non-Indians through allotment or sale. Through zoning, a tribe can limit the use of such land to the point that it becomes virtually worthless and unsalable except to the tribe at a greatly reduced price.

The case of George Garland, president of amicus Quinault Property Owners Association, illustrates the point just made. Mr. Garland, a non-Indian, owns a tract of land on the Quinault Indian Reservation in northwestern Washington. The Quinaults have enacted a comprehensive zoning ordinance, under which Mr. Garland's land is designated "wilderness." Land so designated generally cannot be improved or developed. The only uses permitted unconditionally are picnicking, hiking and "day camping." A conditional use permit is required for overnight camping and timber harvesting. Most other commercial, industrial and residential activities are prohibited. See Quinault Zoning Ordinance sec. 48.04.06. Following its designation as wilderness, the value of Mr. Garland's property, as assessed by Grays Harbor County, wherein the reservation lies, dropped from $32,000 to

$2700. These amici do not mean to suggest that the Quinault tribe is in fact zoning Mr. Garland's land in order eventually to acquire it on the cheap -- merely that he would have no recourse if it is, which demonstrates the need for courts to be cautious in permitting tribal regulation of nonmembers.

The desire for recovery of treaty lands is strong-felt and pervasive among Indian tribes. Indeed, in its oral findings in this case, the District Court said it was "not unmoved" by "the desire, the sincere desire of the Tribe and its Members to have the deeded land restored to it."

Tribes can also use zoning to handicap non-Indian businesses that compete on the reservation with Indian businesses.

The fact that non-Indians cannot participate in tribal government is not itself reason to deny tribes the right to regulate the activities of non-Indians on

land they own within reservation boundaries, see United States v. Mazurie, supra, 419 U.S., at 557-58; Williams v. Lee, 358 U.S. 217, 223 (1959); compare Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 172-73 (1982) (Stevens, J., dissenting), but it is reason to construe narrowly any exception to that general rule, a point neglected by the Court of Appeals.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
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STANLEY WILKINSON, *Petitioner,*

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *Respondent.*

COUNTY OF YAKIMA et al., *Petitioners,*

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief Of The States Of Arizona, Idaho Michigan, Montana, Nevada, New Mexico, North Dakota, Utah, Washington, And Wyoming As Amici Curiae In Support Of Petitioners

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QUESTIONS PRESENTED

1. Does an Indian Tribe have the authority to control, through comprehensive zoning, the use of land owned by non-members but located within a reservation's boundaries, under either of the following circumstances:

(a) The land has been alienated to a non-Indian, pursuant to the federal Allotment Acts; or

(b) The land, originally allotted to a tribal member, has been received through inheritance by an heir of such member, but the heir, by reason of insufficient blood quantum, is not a tribal member?

2. Is it constitutionally permissible, under the Due Process Clause of the Fifth Amendment to the United States Constitution, for the United States acting through either the Congress, the Executive Branch, or the courts, to adopt a policy pursuant to which:

(a) Indian tribal governments have general civil regulatory jurisdiction over non-member reservation residents and their on-reservation property; and

(b) Such residents have none of the rights of participation in tribal government, as either voters in tribal elections or as candidates for tribal offices, enjoyed by tribal members, and, by reason of their ancestry, are disqualified from ever attaining such rights through tribal membership?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF THE STATES AS AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. Introduction	6
II. The Court Of Appeals Has Completely Disregarded The Intent Of Congress, As Embodied In The Allotment Acts	9
III. The Indian Reorganization Act Of 1934 Did Not Repudiate The Policy Embodied In The Allotment Acts That Tribes Would Have No Civil Jurisdiction Over Non-Indians, But Confirmed That Policy	9
A. The Original Wheeler-Howard Act	10
B. Objections to the Original Wheeler-Howard Act	12
C. The Revised Wheeler-Howard Act (S. 3645)	15
IV. The Understanding Of The Executive Branch Has Been That Indian Tribes Have No Inherent Civil Regulatory Power Over Non-Indians	16
V. Under The Second Exception To The General Rule Established In Montana, Tribal Jurisdiction Over Non-Indians On Non-Indian Land Should Be Limited To Situations Which Parallel, And Are Mirror-Images Of, Those Situations In Which State Jurisdiction Applies To Reservation Indians	20
VI. PRACTICAL AND CONSTITUTIONAL CONSIDERATIONS	24
CONCLUSION	28

TABLE OF AUTHORITIES

Page

Federal Cases:

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 27

Cipriano v. Houma, 395 U.S. 701 (1969) 27

DeCoteau v. District Court, 420 U.S. 425, at 431 (1975) . 2

First English Evangelical Church v. Los Angeles County, 482 U.S. ___, 107 S. Ct. 2378 (1987) 25

Fisher v. District Court, 424 U.S. 382 (1976) 20

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 21, 24

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) 27

Kramer v. Union Free School District, 395 U.S. 621 (1969) 27

Marsh v. Alabama, 326 U.S. 501 (1946) 27

McClanahan v. Arizona Tax Commission, 411 U.S. 164, 172 (1973) 3, 7, 21, 25

Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) 21

Montana v. United States, 450 U.S. 544 (1981) 4, 5, 6, 9, 20, 22, 23, 24, 27

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985) 26

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 4, 21, 22

National League of Cities v. Usery, 426 U.S. 833 (1976) 21 24

Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978) 6, 7, 9

Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1977) 4, 21, 22

Rice v. Rehner, 463 U.S. 713 (1983) 22

Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973) 27

Shelley v. Kraemer, 334 U.S. 1 (1948) 27

Talton v. Mayes, 163 U.S. 376 (1896) 26

Thomas v. Gay, 169 U.S. 264 (1898) 21

United States v. Mazurie, 419 U.S. 544 (1975) 23

United States v. Wheeler, 435 U.S. 313 (1978) 26

TABLE OF AUTHORITIES (Continued)

Page

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) 4, 21, 22

Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, at 141 (1981) 7

Williams v. Lee, 358 U.S. 217 (1959) 20

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 3, 8, 21

Tribal Cases:

Colville Confederated Tribes v. Cavenham Forest Industries, Inc., 14 Ind. L. Rptr 6043 (Colville Tribal Ct., Nov. 16, 1987) 25

Statutes:

18 U.S.C. § 1161 23

Clean Air Act, 42 U.S.C. § 7401 et seq. 24

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, et seq. 23

General Allotment Act of 1887, 24 Stat. 388 6

Indian Reorganization Act of 1934, 48 Stat. 984 ..... 4, 9, 15, 16, 17, 19, 24, 25

Water Quality Act of 1987, 33 U.S.C. §§ 1251, et seq. 23

Miscellaneous:

78 Cong. Rec. 10, 15, 16

Cohen, Handbook of Federal Indian Law (Univ. N. Mex. reprint) 17, 19

Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73rd Cong., 2d Sess. (1934) 10, 11, 12, 16, 27

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55 I.D. 14 17

"Wheeler-Howard Act — Interpretation," Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I, 484, 489-91 (Dec. 13, 1934) 9, 15, 18

2 Op. Atty. Gen. 693 (1834) 26

Nos. 87-1622, 87-1697, and 87-1711

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

PHILIP BRENDALE, *Petitioner,*

v.

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Brief Of The States Of Arizona, Idaho Michigan, Montana, Nevada, New Mexico, North Dakota, Utah, Washington, And Wyoming As Amici Curiae In Support Of Petitioners

INTEREST OF THE STATES AS AMICI CURIAE

Each of the States submitting this brief has within it one or more Indian reservations. On many of those reservations the "familiar forces" set in motion by the Federal Gov-

ernment in the late 1800's and alluded to by this Court in *DeCoteau v. District Court*, 420 U.S. 425, at 431 (1975), have produced the expected results. Pursuant to the invitation of the Federal Government, non-Indians have purchased land and established their homes and businesses there, and in many cases now actually outnumber the Indian population.[1] We estimate the total non-Indian reservation population, nationwide, to be about 350,000.[2] The Yakima Reservation provides a typical example of these "familiar forces"; the non-Indian population, about 20,000, is over four times the Indian population.

The Yakima Reservation also provides an example of the types of claims being made by the Tribes affected by those forces. The Yakima Tribe here claims that its inherent tribal sovereignty includes within it not only governmental power over its own members, but also civil regulatory power over non-Indians and their property. Secondly, the Tribe claims that the exercise of such power over non-Indians and their property preempts any similar power by State and local governments. In *Whiteside I*, the court below upheld both claims. In *Whiteside II*, it upheld the first, but left the second for later resolution.[3]

The interest of the amici States in this case is thus twofold. The first is in protecting a large group of the State's citizens from a tribal government in which they cannot participate in any manner, and the actions of which, however arbitrary, are not subject to any effective judicial checks. Second, if the decision below is not reversed, we fully expect

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[1] A state-by-state list of all reservations has been attached as Appendix A to the amicus brief of the states of Arizona et al. in support of the petitions for a writ of certiorari in this case (hereinafter "State amicus brief in support of certiorari"). This list also contains the total population and the Indian and non-Indian populations for each reservation. See p. 2, note 1, of that brief for the source of the list. While that list apparently applies the term "Indian" to all persons with Indian blood, we shall use the term "non-Indian" to include all non-members even though they may have Indian blood and some tribal affiliation.

[2] See Appendix A to State amicus brief in support of certiorari for the data from which this estimate is made.

[3] Cause No. 87-1622 encompasses *Whiteside I*, and Cause Nos. 87-1697 and 87-1711 encompass *Whiteside II*.

even more claims of tribal preemption of State power over non-Indians, not just in the area of zoning, but in broader areas such as environmental controls, taxation, and general business regulation. Thus, tribal governments in which non-Indians have no voice and over which there are no effective political or legal checks may be increasing the scope of their powers, and gradually replacing, as a practical matter, those governmental bodies in which the non-Indians do have a voice and over which there are effective checks. Further, a serious balkanization of government within each State, and a breakdown of each State's power over these non-Indians, would inevitably result.

We cannot countenance such a development. Nor should this Court.

SUMMARY OF ARGUMENT

1. We first address the question: How should the Court view its function in this case? A balance of federal, tribal, and state interests must inevitably be struck. But rather than striking the balance itself, by developing some sort of common law of tribal sovereignty, the Court should ascertain, from specific treaties and statutes, how Congress has struck the balance, with the concept of tribal sovereignty providing only a "backdrop" for the interpretive process. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973). This approach, moreover, is essentially that utilized in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

2. Article II of the Treaty with the Yakimas, 12 Stat. 951 (1959) reserves certain lands for the Yakimas' "exclusive use and benefit", and prohibits non-Indians from going onto those lands without tribal permission. These provisions are, in effect, the Tribe's charter for self-government. But they shed little light on the central question here: Is the Tribe to have jurisdiction over non-Indians on non-Indian lands as well? For there were to be no non-Indian lands within the reservation at all, and few, if any, non-Indians.

3. The allotment policy in large part rescinded the original promise contained in these provisions, by inviting non-Indians to buy land and settle within the reservation. That policy, moreover, contemplated the elimination of tribal self-

government and the whole reservation system, and thus contained another promise, *viz.*, that these non-Indians and their successors would be free from tribal control. The allotment policy, however, did not run its course; in 1934 the Indian Reorganization Act ("IRA") intervened.

Viewed in light of its legislative history, the IRA actually confirmed the promise of the allotment acts that non-Indians would be free from tribal control. For the original bill, drafted and vigorously supported by the Interior Department, would have expressly authorized tribal legislative and judicial power over non-Indians, through the device of federally chartered Indian communities. This proposal, however, proved so controversial that it was stripped from the bill. And in two important opinions construing the IRA, issued shortly after its enactment, the Department of Interior in effect acquiesced in its defeat on this point, and expressly refused to recognize any broad tribal governmental power over non-Indians.

4. Our submission thus far is completely consistent with the rationale and result in *Montana v. United States* 450 U.S. 544 (1981). But *Montana* expressed two exceptions to its general conclusion that Tribes have no civil jurisdiction over non-Indians on non-Indian lands, the second involving conduct by non-Indians which " * * * threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. How can that exception be reconciled with the promise of freedom from tribal control embodied in the allotment acts? And what is its scope?

We start with the proposition that "* * * in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). Those exceptions involve situations in which Indians are in effect destroying a State's ability to govern its own non-Indian citizens, as in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) or destroying a resource to which those citizens have a rightful claim, as in *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977). The second exception in *Montana* would

encompass a parallel set of "exceptional circumstances"—mirror images of the first set—and would be firmly grounded on the treaty promise of self-government.

The treaty also contains an implied promise that the remaining Indian lands will be "livable". *See Montana*, 450 U.S at 566, note 15. This promise may create a right to prevent uses of non-Indian property within a reservation that would make the adjacent Indian property "non-livable". To the extent it exists, that right would be enforceable through a type of nuisance action in court or through existing state and local land use procedures. Moreover, should a State or local government completely abdicate its zoning responsibility, so that neither a nuisance action nor existing land use procedures would adequately protect the "livability" of Indian lands, tribal power could arguably fill the gap. But in this case, of course, there is no such gap.

Moreover, Congress has been quite willing, in recent years, to protect tribal interests by granting authority over non-Indians when the Tribes can show the need for it. Such areas as liquor sales, water quality, and air quality provide examples. These actions by Congress caution against an expansive reading of the *Montana* exceptions.

5. Constitutional considerations likewise caution against any such reading. Because non-Indians will have no effective checks, judicial or political, over the exercise of tribal power, the temptation to abuse that power may prove irresistible. This total lack of accountability raises serious constitutional questions. While tribal governments are shielded from the Bill of Rights, the Federal Government is not. Yet tribal governments have legal powers—indeed, legal existence—only because they are recognized as such by the Federal Government and have, once recognized, only those powers which that government intends them to have. This close relationship brings the familiar "state action" doctrine into play.

This doctrine, in turn, brings into operation the guarantees established in the Court's voting rights decisions. And an expansion of the scope of tribal government over non-Indians beyond those narrow limits which we have suggested can be constitutionally justified only if accompanied by a parallel expansion of the right to participate in that government.

ARGUMENT

I. Introduction.

In *Montana v. United States*, 450 U.S. 544 (1981), this Court held that the Crow Tribe could not prohibit or otherwise regulate the use of non-Indian reservation land for hunting and fishing. In this case, the court below held that the Yakima Tribe could regulate and even prohibit the use of the same type of land for just about any other purpose.

These sharply different results stem from the different rationales utilized by each court. In *Montana*, the Court concluded that the principles relied upon in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) are generally applicable on the civil, as well as the criminal side, and thus preclude tribal civil jurisdiction over non-Indians on non-Indian lands. The Court also concluded that the policies embodied in the various allotment acts, such as the General Allotment Act of 1887, 24 Stat. 388, require this result as well.

The Court in *Montana* expressed, however, two qualifications or exceptions to this general result, which are at the heart of the controversy here. Seizing upon these exceptions, the court below has construed and applied them so broadly as to swallow up the general rule established in *Montana*, and has thus eviscerated the protections accorded to non-Indians in the allotment acts.

The first of the two exceptions is as follows:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [citations omitted] *Montana*, 450 U.S. at 565-566.

The Court then immediately stated the second:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [citations omitted] *Montana*, 450 U.S. at 565-566.

A central issue in this case is the scope of this second exception, which we shall examine at some length.[4] We would here simply ask: Is that exception "a creature of judicial cloth"? *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, at 141 (1981). Or is it a creature of "legislative cloth"?[5] *Ibid.* Although the Court must certainly do the weaving, the major materials, we submit, must be statutes and treaties; and the task in this case is, in the final analysis, to determine congressional intent, not to fashion some sort of common law of Indian sovereignty.

Fifteen years ago, this Court rejected reliance upon "platonic notions of Indian sovereignty" as a basis for determining the scope of an Indian's immunity from state law. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973). In so doing, the Court stated that one must "* * * look instead to the applicable treaties and statutes which define the limits of state power," with the concept of Indian sovereignty providing only a "backdrop" for the reading of those treaties and statutes. *Ibid.*

McClanahan provides the proper approach here as well. This case involves, to be sure, an effort by an Indian community to assert governmental power over a member of the non-Indian community and not, as in *McClanahan*, an effort by the non-Indian community to assert governmental power over a member of the Indian community. But that difference does not make the platonic notion of Indian sovereignty any more useful here, or concentration upon applicable treaties and statutes any less important.

This is not to suggest that judge-made law is unimportant; far from it. But that judge-made law should be, in the final analysis, an effort to ascertain the intent of the Congress, as manifested in various federal statutes and treaties,

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[4]Under the facts of this case, it is difficult to see how the first could possibly be applicable; for there are no consensual relationships of any sort involved here at all.

[5]During oral argument in *Oliphant*, essentially the same threshhold question was phrased this way by a member of the Court:

> Well, what is it? Is it just sort of a federal common law which we are not * * * if this Court holds that the Tribe has some residual sovereignty, what authority have we got to say that? Is this sort of a federal common law?

Tr. of oral argument, p. 44.

and not an exercise in divining the content of a platonic notion through an exegesis of the Court's prior opinions.

Moreover, whether one views the problem of the scope of tribal jurisdiction over non-Indians as one of "common law" or of Congressional intent has important practical consequences. Problems in this area necessarily involve a balancing of federal, state and Indian interests; and it makes a difference whether the Court views its role as that of striking the balance itself, or instead ascertaining the balance that Congress has struck.

The manner in which the Congress has struck the balance may not always be clear. But to abandon the focus upon Congressional intent is to invite *ad hoc* decision making, and to render stability, predictability, and uniformity of results, both over time and among reservations, virtually imposible.

Furthermore, to recognize that the question ultimately is one of Congressional intent is to recognize also that the Constitution may have a bearing on the question, so as to restrict the range of choices open to the Congress in this area, no less than in others, and that fundamental civil rights are here at stake.

One last preliminary point. The approach which we here suggest is essentially that taken by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the supposed fountainhead of the notion of tribal sovereignty. The question there before the Court was whether the State of Georgia had the power to control the right of non-Indians to enter Cherokee territory, and, even more broadly, to adopt a set of laws taking complete control over the affairs of the Cherokee Nation. To answer that question, the Chief Justice examined in great detail the various provisions of two treaties between the Cherokees and the United States; *viz.*, the Treaty of Hopewell, 7 Stat, 18 (1785) and the Treaty of Holston, 7 Stat. 39 (1791), together with various Acts of Congress regulating Indian affairs. *See* 31 U.S. (6 Pet.) at 551-556. From this analysis he concluded that the Cherokees were intended by Congress to be "* * * a nation admitted to be capable of governing itself," and accordingly free of the control which Georgia was asserting. 31 U.S. (6 Pet.) at 556.

The Chief Justice, in short, utilized an inductive, rather

than a deductive approach. He did not start with the platonic notion of tribal sovereignty, and then attempt to ascertain what governmental powers were encompassed by that notion. Rather, he asked what conclusion was required by specific treaty and statutory provisions. Thus, the approach we here suggest is historically, as well as analytically, the correct one.

II. The Court of Appeals Has Completely Disregarded the Intent of Congress, As Embodied in the Allotment Acts.

In denying to the Crow Tribe the authority to regulate hunting and fishing by non-Indians on non-Indian lands, the Court in *Montana* relied not only upon the *Oliphant* rationale, but also upon the policies of Congress, as embodied in the Allotment Acts of the late 1800s, pursuant to which the non-Indians had obtained those lands in the first place.

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with dissolution of tribal affairs and jurisdiction. [citations omitted] It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. * * * *Montana*, 450 U.S. at 559, note 9.

The court below has effectively torn up the protections which Congress intended non-Indians to have under the allotment acts. But has the Congress itself torn up those protections, when it halted the allotment process in 1934 by enacting the Indian Reorganization Act? As we shall next show, far from tearing them up, Congress actually confirmed them.

III. The Indian Reorganization Act of 1934 Did Not Repudiate the Policy Embodied in the Allotment Acts That Tribes Would Have No Civil Jurisdiction over Non-Indians, but Confirmed That Policy.

The original Wheeler-Howard Act, now commonly referred to as the Indian Reorganization Act of 1934 ("IRA"),

was an extremely comprehensive and controversial piece of legislation. It contemplated a major reversal of Federal Indian policy.

In both the Senate and the House of Representatives, the bill received almost unprecedented attention. In the House alone, the Committee on Indian Affairs held 29 sessions on the bill. 78 Cong. Rec. 11,726 (1934). The Chairman of that Committee, Mr. Howard stated: "[i]t is doubtful if any piece of legislation in the history of the country has been more thoroughly and intelligently studied and debated * * *" *Id.* at 11,731.

This study and debate resulted in a complete revision of the original bill, which had been drafted by the Interior Department. "It was so drastically amended that they took out everything but the title." *Id.* at 9268 (statement of Mr. Peavey). And as stated by Congressman Ayers of Montana, the original bill, "* * * was never Wheeler's or Howard's baby * * * it was laid on their doorstep, and they have cast it off and brought forth legitimate offspring." *Id.* at 12,165[6].

We first examine the original bill, and then trace through the changes which resulted in the IRA as finally enacted.

A. The Original Wheeler-Howard Act.

The original bill contained four separate titles: Title 1—Indian Self-Government; TItle II—Special Education for Indians; Title III—Indian Lands; and Title IV—Court of Indian Affairs. Title I was the heart of the bill, and § 2, in turn, was the heart of Title I. Under § 2, the Secretary of the Interior would have been given authority to issue charters creating Indian communities and transferring to them "any and all such powers of government as may seem fitting in light of the experience, capacities, and desires of the Indians concerned."

Section 4 spelled out in more detail the powers which could be included in these charters. The first is found in subsection (a):

> (a) To organize and act as a Federal municipal corporation, to establish a form of government to adopt and thereafter amend a constitution, *and to promulgate, and enforce ordinances and regulations for the effectuation of the functions hereafter specified, and any other functions customarily exercised by local governments.* (Emphasis supplied.)

Subsection (d) granted another important power:

> (d) To establish courts for the enforcement and administration of ordinances of the community, which courts shall have *exclusive jurisdiction over all offenses of, and controversies between, members of the chartered community, and jurisdiction exclusive or non-exclusive over all other cases arising under the ordinances or the community* * * * (Emphasis supplied.)

The provisions of the bill establishing the new court system warrant closer examination, because they confirm that under the bill both legislative and judicial power would be exercised over non-Indians.

In Title I there was no provision for an appeal from the local courts established pursuant to subsection (d) of § 4. But this was addressed in another part of the bill which also dealt with courts; Title IV would have established a Court of Indian Affairs. Section 3 spelled out the broad jurisdiction of that court, which included jurisdiction in "all cases, civil or criminal, *arising under the laws and ordinances of a chartered Indian community, wherein a real party in interest is not a member of such community.*" (Subsection 4, emphasis supplied.)

The drafter of the original bill, Felix S. Cohen, explained the connection between the local court and the special Court of Indian Affairs:

> Mr. Cohen. May I call attention to the connection between the local court and the special court of Indian affairs? The court of Indian affairs has general power to review decisions of the local court wherever a person not a member of the community is involved in the dispute. Readjustment of Indian Affairs: Hearings on H.R. 7902 before House Committee on Indian Affairs, 73rd Cong., 2d Sess. 80 (1934) (hereinafter "1934 House Hearings").

Clearly, a chartered Indian community was to have broad legislative jurisdiction over non-Indians residing

[6]The original bill introduced as H.R. 7902 and S. 2755, is reproduced in Appendix A, and the amended version passed by Congress, S. 3645, is reproduced as Appendix B.

within it[7] — as broad as those of any municipal corporation or other unit of local government. And, as Felix Cohen testified, the local tribal court and the Court of Indian Affairs would have correspondingly broad jurisdiction over non-Indians as well. But as we shall next see, the Senate Committee of Indian Affairs objected to these provisions — and Titles I and IV were entirely eliminated from the final bill.

B. Objections to the Original Wheeler-Howard Act.

Exactly why the legislative and judicial provisions were found objectionable is somewhat complicated. It was generally conceded that they might work on reservations where Indian lands and populations were already consolidated. But the Senate committee did not believe it would work on checkerboarded reservations, such as the Yakima Reservation at issue here.[8] Responding to these objections, the chief spokesman for the original bill, Commissioner Collier of the BIA, assured the committee that tribal jurisdiction over non-Indians would not be as extensive as might appear. Only when an extensive consolidation of both Indian land and Indian population had occurred would the tribe be allowed to set up an "Indian community". As Commissioner Collier explained, "Title III [Indian Lands] is pretty closely linked with Title I

[7] See also the definitions in the original bill for "territory of a chartered community" and "reservation", which include non-Indian lands within those terms. Title I, § 13: 1; m, See also 1934 House Hearing at 7.

[8] An example of the committee consensus on this point is as follows:

> Senator Thomas [of Oklahoma]. If the bill would not work in the Navajo Reservation, where there is a great area populated exclusively by the Navajos, I can hardly see where it could operate in a State like mine* * * Then they would be surrounded very likely with thickly populated white sections* * *
>
> I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly settled population. I think it may be all right in a place like the Navajos, so far as I can see now, or the Menomonees or the Klamaths.
>
> The Chairman. I thought it would work among the Navajos and the Indians in New Mexico and Arizona if it would work any place.
>
> Readjustment of Indian Affairs: Hearings on S. 2755 before Senate Committee on Indian Affairs, 73rd Cong., 2d Sess. 145 (1934) (hereinafter "1934 Senate Hearings").

[Indian Self-Government]". 1934 Senate Hearings at 63. Although the original bill set no specific guidelines as to just when there would be enough consolidation in order to set up a chartered community, Commissioner Collier assured Congress as follows:

> Mr. Collier. This bill in Title I deals with self-government of Indian tribes and provides that an Indian community which has a *solid geographic area may* have a court and enforce its laws through the court.
>
> 1934 Senate Hearings at 317. (Emphasis supplied.)

And again:

> Commissioner Collier. It is perfectly evident that a group of Indians who are scattered among whites, who are attending the public schools or using the common institutions, would not form a territorial government. They might do other things.* * *
>
> It is equally evident that Indians living in great solid geographical areas would do precisely that.
>
> 1934 Senate Hearings at 67-68.

Chairman Wheeler, a former county prosecutor in Montana, had two main objections to the original bill. First, he was worried that the Secretary of the Interior would not wait until there was a solid block of Indian land and Indian population before issuing the charters creating the Indian communities, and that establishing a "government within a government" under those circumstances would lead to "conflicts in the Northwest between the Indians and the whites".[9]

[9] The following exchange is just one example in the hearings where the Chairman articulated his belief that the bill, if enacted as introduced, would lead to conflicts:

> The Chairman. But it seems to me — for instance, take you Montana Indians — here is what you do: you say: [reading Title I, § 4 introduction to (a)]
>
> Now, what do you mean by establishing a form of government?
>
> Commissioner Collier. Municipal government.
>
> The Chairman. * * * If that is true, you are going to let them — [reading Title 1, § 4 (b), (c), (d), (e), (f), (g)]
>
> In other words, you have practically delegated to the Indian Office all of the powers and the right to execute any power not inconsistent with the Constitution. Now, my own view about that matter is, as far as the Montana Indians are concerned, that it would be a step backward for them rather than a step forward.
>
> Commissioner Collier. But Senator, the Montana Indians would not do that.
>
> * * *

In short, he did not accept Commissioner Collier's assurances.

Second, where the Indian lands and population were already consolidated, with the result that the Indians already controlled the existing units of local government, the new chartered community would just create an additional layer of government. Thus a representative of Montana's Blackfeet Tribe told the committee that his tribe would indeed attempt to form an Indian community government on top of the already existing State and local governmental structure, as the following exchange shows:

> Senator Thomas [of Oklahoma]. Which would you do? Would you surrender your participation and activity in the present set-up, or would you form a new charter, new form of government, and move over and get into that?
>
> Mr. Brown [of the Blackfeet Tribe]. We would take both of them. We can take both of them under the bill. 1934 Senate Hearings at 170.

What bothered the Senate committee about this arrangement was the fact that the Blackfeet Indians, unlike many other Northwest Tribes, but like many Southwest Tribes, such as the Navajos, already dominated the existing

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> The Chairman. Well, you might possibly, Mr. Commissioner, get, for instance, some tribe of Indians of Montana who would want to try this, and they might get a sufficient number of signers to a petition to have a charter issued.
>
> Commissioner Collier. Yes.
>
> The Chairman. But if they did do it, in my judgment, it would bring about all kinds of conflicts between your Indians and the white people, and, in addition to that, it would set back the Indians, in my judgment, considerably by doing it, and I am afraid that would lead to conflicts in the Northeast between the Indians and the whites.
>
> I mean, supposing the Indian Bureau went out there, for instance, if you had this provision in there; your Indian Bureau could go out there and take those Indians possibly and propagandize them and get sufficient numbers of them to sign it and issue a charter, and then attempt to set up this government within a government out there, which would be, in my judgment, a serious mistake on the part of the Indians to do it.
>
> Now, I am not as familiar with the Indians down in the Southwest, and it might be possible that it would work out all right for the Navajos.
>
> 1934 Senate Hearings at 67-68.

political community.[10] Thus, the irony of the original Wheeler-Howard Act is that on those reservations where it might have worked best it was needed least. More generally, the committee feared setting up an Indian community government which might enact laws which would conflict with those of the State and local governments. And it was because of these various concerns that the provisions conferring those powers were stripped from the bill. Titles I and IV were thus eliminated. As summarized by Senator Wheeler:

> Chairman Wheeler. My thought about the bill is simply this: That you are going entirely too far at the present time in letting those tribes set up these rules and regulations, because they might conflict. As I said, when you take the Northwestern Indian reservations, as I pointed out, you have Indians at the present time holding county and State offices. Then, if you give them the power to set up an entirely new government within their reservations and to pass ordinances and regulate all Indian affairs, I think it would bring you into all kinds of conflicts * * * 1934 Senate Hearings at 199.

C. The Revised Wheeler-Howard Act (S. 3645)

The IRA which Congress adopted, as we have just seen, did not authorize the Secretary of the Interior to convey, or confirm, any compulsory governmental power over Indians, must less non-Indians.[11] In the words of Chairman Wheeler:

> The Committee on Indian Affairs eliminated all those compulsory provisions and eliminated from the bill as originally presented the right of the Indians to make laws upon the reservations. 78 Cong. Rec. 11,123 (1934).

After being stripped of all its controversial provisions, what the IRA did do, primarily, was to: (1) stop further alienation of Indian lands; (2) provide for acquisition of land for landless Indians; (3) stabilize the tribal organization by vesting them with "real, though limited, authority, and by prescribing conditions which must be met by such tribal

---

[10] See 1934 Senate Hearings at 169-170. See also id at 179, 198-200.

[11] *See* 1934 Senate Hearings at 248-249. From this portion of the hearings, it is clear that Congress intended that a recognized tribal member would be able to avoid the civil regulatory jurisdiction of his own tribe by withdrawing his membership in the tribe. Accord Op. Sol. I.D. Aff. 1917-1974, Vol. I, 484, 489-91 (Dec. 13, 1934), discussed at p. 18, *infra*.

organizations", and (4) provide that "Indian tribes may equip themselves with the devices of modern business organization through forming into business corporations". *Ibid.*

As summarized by Senater Wheeler:

> * * * [T]he bill proposes to give the Indians an opportunity to takeover the control of their own resources and fit them as American citizens. 78 Cong. Rec. 11,124 (1934).

In eliminating the objectionable features of the original bill it was thought that these governments within governments would "poison [the Indians] against their State constitution" and "their local governments, of which they are a part." *Id.* at 9268. It was also recognized that non-Indians would "kick like steers" if subjected to the proposed system. 1934 House Hearings, at 136.

Contrary to the conventionally accepted wisdom, then, the final version of the IRA did not contemplate a complete break with the assimilation policy contained in the allotment acts. It did eliminate, however, a major "driver" in that policy, *i.e.*, the ability of Indians to alienate their remaining lands. Most importantly, the IRA, viewed in the light of its long legislative history, represents a deliberate policy decision by the Congress that Indians would not have compulsory jurisdiction over non-Indians. And that is reason enough for this Court to deny any claim to such powers now.

IV. The Understanding of the Executive Branch Has Been That Indian Tribes have No Inherent Civil Regulatory Power over Non-Indians

The Department of Interior, as we have seen, was singularly unsuccessful in obtaining a bill which vested governmental powers in Indian tribes through the device of federally chartered Indian communities. A phrase in §16 of the IRA as enacted, however, provided a springboard for the Department to regain some lost ground. That phrase referred to "all powers vested in any Indian tribe * * * by existing law".[12] In an opinion dated October 25, 1934, four months

[12] The Department of Interior drafted the final, as well as the original, version of the IRA. See 1934 Senate Hearings, at 237. Thus this phrase is the product of the Department's draftsmen; and it received little attention from the Committee. *Id.* at 244.

after enactment of the IRA, the Solicitor of the Department set out the Department's views as to what powers were encompassed by that phrase. See 55 I.D.14 (M-27781). Though signed by Solicitor Margold, the actual author of that opinion was the author of the original version of the IRA, Felix Cohen. See Cohen, Handbook of Federal Indian Law, ix, xiv (1942: Univ. N. Mex. reprint).

The basic premise underlying the whole opinion is set out as follows:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analysed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. * * * What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the statutory category, "powers vested in any Indian tribe or tribal council by existing law". 55 I.D. at 19.

With this sweeping start, one might expect that the opinion would then go on to enumerate broad powers over non-Indians as part of the "powers vested * * * by existing law." But surprisingly, such is not the case at all. The powers discussed principally relate to what the opinion calls "internal sovereignty", *i.e.*, power over members 55 I.D. at 22. (*See* generally the opinion summary, 55 I.D. at 16-17.)

With respect to the power of taxation, however, the opinion states that such power extends not only to members, but also to nonmembers "* * * so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." 55 I.D. at 46. This qualification is significant. Non-Indians on non-Indian lands within a reservation are there pursuant to the policy of the Federal Government, not at the sufferance of the Tribe. And the Tribe, accordingly, has no inherent power to tax them. "Existing law", as the writer of the opinion was certainly aware, still included the allotment acts.

This lack of inherent power to tax or otherwise regulate the persons or property of non-Indians on non-Indian land

was made explicit in a subsequent opinion of Solicitor Margold, issued just two months later, on December 13, 1934. In an opinion entitled "Wheeler-Howard Act — Interpretation", the Solicitor considered the specific question of the extent of the tribal power of condemnation. See Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I 484, at 489-491 (M. 27810).

The opinion first considered the source of this tribal power.

> The power of eminent domain is one of the usual powers of sovereignty. It is, as the United States Supreme Court held in *Cincinnati v. Louisville and Nash. R.R. Co.* (223 U.S. 390, 404) "one of the powers vital to the public welfare of every self-governing community."
>
> No Federal statutes terminating the exercise of this power by an Indian tribe are known. Therefore, under the doctrines advanced in the recent opinion of this Department on "Powers of Indian Tribes" (M-27781, approved October 25, 1934), the power of eminent domain is one of those powers which are vested in an Indian tribe within the meaning of Section 16 of the Wheeler-Howard Act. At 489.

Yet Solicitor Margold concluded:

> I am of the opinion that the Indian Service is correct "in assuming that a tribe organized under section 16 may exercise the power of eminent domain in the acquisition of land as against its members, but not in the case of land owned in fee by non-members." *Ibid.*

This inherent power of eminent domain, which is "one of the usual powers of sovereignty," may be exercised only with respect to tribal members.

From this, Solicitor Margold draws another important conclusion:

> It is proper to add that since the tribal power of condemnation is based, in the first instance, upon tribal jurisdiction over the members of the tribe, it ceases to exist where an Indian abandons his tribal membership; and as was said in the opinion of this Department on "Powers of Indian Tribes," (M-27781, approved October 25, 1934, at page 36), "any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses." * * *
>
> Threatened oppression in the form of condemnation, taxation, or other incidents of social control may be avoided by the termination of the landowner's tribal status. But if he remains to share in the benefits of tribal life he must bear its burdens.
>
> The restricted land of the Indian who has severed his tribal affiliation is not subject to tribal condemnation proceedings under tribal law. At 490.

Non-Indians are in the same status as the Indian who has severed his tribal membership, as the opinion goes on to make clear.

> Accordingly, patented land may be condemned, as it may be taxed on exactly the same basis as the land of non-Indians. An Indian tribe will have whatever rights of condemnation the laws of the State may give to it.
> * * *
>
> Land held in fee, therefore, whether owned by Indians or by non-Indians, may be condemned by an Indian tribe only in accordance with State law, through proceedings brought in State courts. At 490-491.

As this opinion explicitly recognizes, a tribal claim of general governmental power, even if it be on the civil side, and whether it involves condemnation, taxation, or any other form of civil jurisdiction, is valid only with respect to tribal members.

Thus even the Department recognized that the "existing law" referred to in §16 of the IRA, together with the concept of residual tribal sovereignty which gave that "existing law" substance, did not encompass general governmental power over non-Indians. And the Department in effect acquiesced in the congressional rejection of its efforts to gain such power in the IRA.

Just as importantly, the argument that the concept of residual tribal sovereignty includes inherent power over non-Indians is to commit a basic error which Felix Cohen himself warns against. See Cohen, Handbook of Federal Indian Law *supra* pp. 358-360.

Quoting from a ruling by the Solicitor of the Interior Department, April 27, 1939, it is there noted that we must "* * * beware of reading into the measure of this [Indian] jurisdiction the common law principle of territoriality of criminal law." *Id.* at 360. In establishing the source and scope of the Indian tribe's authority for self-government which derives from

> * * * the unextinguished fragments of tribal sover-

eignty, it must be recognized that this sovereignty is primarily a personal rather than a territorial sovereignty. The tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely a jurisdiction over persons. (*Ibid.*).

In short, although Tribes and their members were viewed by the Department as having more of a distinct legal status than Senator Wheeler may have thought, tribal governmental power, even over members, was still essentially consensual, just as Congressional Committees envisioned in 1934. For members could choose to become non-members.

V. Under the Second Exception to the General Rule Established in Montana, Tribal Jurisdiction over Non-Indians on Non-Indian Land Should Be Limited to Situations Which Parallel, and Are Mirror-Images of, Those Situations in Which State Jurisdiction Applies to Reservation Indians.

After establishing in *Montana* the general proposition that Tribes do not retain civil jurisdiction over non-Indians on non-Indian lands, the Court expressed two exceptions. In the second, it stated that a Tribe "*may* also retain" such jurisdiction when the conduct of the non-member "* * * threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-566. (Emphasis supplied)

Determining the scope of this exception is difficult for several reasons. One difficulty stems from the use of the phrase "*may* * * * retain". Does this mean "does retain"? Or does it mean: "A Tribe *might* retain — but it all depends on the circumstances"?

The four cases cited in support of the exception compound, rather than eliminate, this difficulty. Not one of them involved the central question in this case, *viz.*, the power of a Tribe to make an unwilling non-Indian submit to its jurisdiction.[13]

[13] In *Fisher v. District Court*, 424 U.S. 382 (1976), all parties were tribal members. In *Williams v. Lee*, 358 U.S. 217 (1959), the issue was whether a non-member could make a reservation Indian subject to the jurisdiction of a state court, not whether an Indian could make a non-Indian involuntarily subject to the jurisdiction of a tribal court. And in *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906) and *Thomas v. Gay*, 169 U.S. 264 (1898), the issue was whether a non-Indian government had the power to tax property of a non-Indian located on the reservation; and the power was upheld.

Perhaps the language of the second exception was intended to be the start for the development of a doctrine for Indian Tribes which would be analogous to that developed for States in *National League of Cities v. Usery*, 426 U.S. 833 (1976). But the abandonment of that effort for the States in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) certainly cautions against commencing a similar process for Indian Tribes. Indeed, the generality and vagueness of the language used in the second exception reinforces the need for such caution.

What, then, is the source and scope of the exception? We submit that its source can be found in treaty provisions, and that its scope can be determined from decisions applying exactly those same provisions in an analogous context.

We start with the familiar rule that treaty language reserving land for the "exclusive use and benefit" of a tribe — to use the language of the Yakima Treaty — creates an immunity for the Tribe and its members from the reach of State law within the reservation.[14] This treaty-based immunity was first developed in *Worcester* and reaffirmed in *McClanahan*. But there are some narrow exceptions to this immunity. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, at 331-332 (1983). In *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977), for example, the Court held that the State could enforce its conservation regulations directly against tribal members fishing within the reservation, in order to conserve a resource to which non-members were entitled as well. Similarly, in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), the Court held that State law could require Indian sellers of cigarettes to collect and remit to the State a tax on non-Indian buyers, even though the sales took place on reservation trust land.

[14] The specific language can vary from treaty to treaty, and in the case of executive order reservations, for which the executive order typically does not use such language at all, the language may be implied.

These results are applications of the more general point made in *Rice v. Rehner*, 463 U.S. 713 (1983), which upheld the power of States to regulate on-reservation sales of liquor by Indians, and which stated, in reversing the Ninth Circuit:

> The court below erred in thinking that there was some *single* notion of tribal sovereignty that served to direct *any* pre-emption analysis involving Indians. *Rice*, 463 U.S. at 725 (Emphasis in original).

The treaty-based immunity, then, is not absolute. If the Indians are in effect destroying the State's ability to govern its own non-Indian citizens, as in *Colville*, or destroying a resource to which those same citizens have a valid claim, as in *Puyallup*, that immunity is not encompassed in the original treaty promise.

Similarly, however, the right of a Tribe to govern its own members, in accordance with the original treaty promise, might well be destroyed if non-Indians are immune from certain provisions of tribal law, even on non-Indian lands. For example, a Tribe might well be able to require a non-Indian retailer, on non-Indian land within the reservation, to collect and pay over a tribal tax imposed upon its members. This would be the mirror-image of the situation in *Colville*. And similarly, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) may be viewed as the mirror-image of *Puyallup*. More generally, just as the promise of tribal self-government contained in the treaty does not provide absolute immunity from all applications of state law to reservation Indians, so too the promise contained in the allotment acts does not provide an absolute immunity from all applications of tribal law to non-Indians on non-Indian lands. But the exceptions parallel each other, in both result and rationale.

Our suggested reading of second exception in *Montana*, then, brings symmetry and a reasonably high degree of certainty into the application of the treaty provisions and the relevant federal statutes. Perhaps even more importantly, it takes into account the nature of the basic problem, *i.e.*, the need to construe two sets of promises, one to Indians and the other to non-Indians, in a manner which best reflects the intent of a Congress which, after making the first, severely eroded it by making the second.

Two final points regarding the scope of the second exception. As noted in *Montana*, the treaty promise still encompasses a guarantee that the remaining Indian lands within a reservation will be "livable". *Montana*, 450 U.S. at 566, note 15. This guarantee of "livability" may encompass certain rights in addition to the water rights there mentioned. In the instant case, for example, if non-Indian property were to be used in a manner which would make the adjacent Indian property "non-livable", the Tribe or the individual Indian landowner might well have a treaty-based right to abate what would amount to a nuisance, through an action in state or federal court, or to prevent any such uses from arising in the first place, through existing administrative procedures such as those embodied in Yakima County's land use system.[15] Whether the Tribe could, in the absence of any land use regulation at all by the County, enforce the "livability" guarantee by zoning non-Indian land directly is a question not presented here. For the Tribe is here attempting, not to fill a gap created by county inaction, but to grab from the County zoning authority which it has been exercising for many years. *Cf. Montana*, 450 U.S. at 566, note 16.

Second, although our focus so far has been on congressional actions taken many years ago, Congress has not been inactive in the interim. It has conferred upon Tribes a variety of powers over non-Indians, but has done so only after weighing the tribal interests in specific areas and determining that protection of those interests require conferral of such powers. One example is found in *United States v. Mazurie*, 419 U.S. 544 (1975), which upheld the constitutionality of 18 USC §1161, in which Congress delegated to Tribes the authority to regulate the sale and consumption of alcoholic beverages within a reservation, even if the sale or consumption be by non-Indians.

More recent examples are found in the environmental field. Section 518 of the Water Quality Act of 1987, 33 U.S.C.§§ 1251 *et seq.*, sets forth conditions under which certain Tribes may be treated as States for purposes of that Act. See 33 U.S.C. § 1377. The Comprehensive Environmental

[15] State nuisance and land use laws are, of course, also designed to protect "livability"; and any treaty-based right may thus have little practical independent effect, and be essentially cumulative.

Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* also allows, in §9626, for treatment of Tribes as States for certain purposes. Finally, the Clean Air Act, 42 U.S.C. §7401 *et seq.*, allows Tribes to designate the air quality standards which will be applicable to their reservations. See 42 U.S.C. §7474(c).[16]

In short, Congress is not unwilling to protect tribal interests by conferring authority over non-Indians when the Tribes can make their case. Indeed, if the Court were to completely reject the second exception in *Montana* as representing an initial false step, the political process would still protect those interests when they warrant protection. Cf. *National League of Cities v. Usery, supra,* and *Garcia v. San Antonio Metropolitan Transit Authority, supra.*

VI. Practical and Constitutional Considerations.

The reference to "threatened oppression" in Solicitor Margold's second opinion of December 13, 1934, serves as a reminder that important practical and constitutional considerations are here involved. The 20,000 non-Indians who live on the Yakima Reservation cannot participate in the tribal government which is here asserting zoning jurisdiction over them. In addition to there being no political check, there is no judicial check either. Section 10 of the Yakima tribal zoning ordinance makes it clear that no judicial review is available. (J.A. 54) Further, the adequacy of judicial review in a tribal court, even if available, would be subject to serious doubt. See Appendix B to State amicus brief in support of certiorari. (Letter from John R. Bolton, Assistant Attorney General, U.S. Department of Justice, to Senator Daniel K. Inouye, dated January 26, 1988, discussing widespread problems in the administration of tribal legal systems.)

To uphold the power of the Yakima Tribe in this case would result, under these circumstances, in conferring on the Tribe the power to engage in zoning practices which this

[16] The pattern in these environmental statutes is similar to that envisioned in the original version of the IRA, in that conferral of powers upon the tribal entity would be determined by an administrative agency, which would take into account the special characteristics of each Tribe and its reservation.

Court has found unconstitutional when engaged in by any other unit of government. See *First English Evangelical Church v. Los Angeles County,* 482 U.S. , 107 S. Ct. 2378 (1987). Indeed, the Tribe would have every incentive to use this unfettered power to severely reduce the land values of non-Indian property and force the owners to sell out at these reduced values, and in effect use the zoning power as a costless substitute for the power of condemnation.

Further, it must not be overlooked that Indian Tribes, in addition to being governmental units, are often owners of business enterprises as well, just as the final version of the IRA intended them to be. See pp. 15-16, *supra.* In those cases in which there are competing non-Indian business enterprises within the reservation, there will again be every incentive to use its governmental power over those non-Indian businesses to the advantage of its own.[17] In short, to uphold the claim of tribal zoning power in this case is to create exactly the types of conflicts which so concerned Senator Wheeler and which led to the rejection of the original version of the IRA.

To uphold that claim would raise important constitutional issues as well. Indeed, the practical and the constitutional considerations are inevitably linked. We are not suggesting that the constitutional issues require final resolution here; but they certainly form a "backdrop" which is no less important in construing relevant treaties and statutes, than the backdrop of tribal sovereignty. *Cf. McClanahan v. Arizona Tax Commission,* 411 U.S. 164, at 172 (1973).

[17] A situation on the Colville Reservation in Washington illustrates the potential problem. A tribally owned forest products business is in competition with a similar non-Indian business located on fee land, and the Tribe is attempting to exert regulatory authority over that non-Indian business. See *Colville Confederated Tribes v. Cavenham Forest Industries, Inc.,* 14 Ind. L. Rptr 6043 (Colville Tribal Ct., Nov. 16, 1987) (issuing preliminary injunction requiring Cavenham to submit to tribal zoning authority). The case is now on appeal. (Colville Crt. of App. No. CV-87-751)

The Environmental Protection Agency, it should be noted, has recognized the potential conflict of interest between a Tribe as regulator and the same Tribe as one of the regulated parties under various federal environmental statutes, and is attempting to provide safeguards. See, e.g., 52 Fed. Reg. 46712, (Dec. 9, 1987) at 46714. (Proposed rule). Such safeguards are not available, of course, when jurisdiction over non-Indians is based upon some sort of inherent tribal authority, such as the zoning authority here claimed by the Yakima Tribe.

Tribal governments are not subject to the Bill of Rights, which governs the conduct of the Federal Government, or to the Fourteenth Amendment, which governs that of the States and its political subdivisions. *Talton v. Mayes*, 163 U.S. 376 (1896). This is because Indian Tribes, unlike political subdivisions of a State, do not exercise power delegated by a superior sovereign. *United States v. Wheeler*, 435 U.S. 313 (1978).

But if, as we submit, the ultimate controlling factor in this case is congressional intent, the Bill of Rights surely controls the permissible scope of that intent. And this gives rise to an obvious problem. How can it be permissible for Congress to intend — and thereby bring about — a system of government which itself would surely be constitutionally impermissible to the extent that non-Indians who are subject to it cannot possibly participate in it, through the voting franchise or otherwise?

Talton v. Mayes, supra, shields tribal governments from the Bill of Rights; but it does not shield the Congress.[18] Further, it is not just a question of Congress tolerating the continued existence of tribal governments through inaction. If tribal governments are to be true governments, recognizable as such by the federal courts, they must first be recognized as such by the Congress, in a treaty or statute, or by the Executive pursuant to congressional authority. Absent congressional action, the problem does not even arise. And that fact is itself a large part of the problem. In the final analysis, the Tribes have governmental powers only to the extent that Congress so wills. That, after all, is why the extent of these powers is always a federal question. *Cf. National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985).[19]

[18] The applicability of the Constitution to the congressional exercise of its treaty-making power with the Indians, and the constitutional difficulties in a broad grant of tribal jurisdiction over non-Indians, were recognized by the Attorney General of the United States 150 years ago. *See* 2 Op. Atty. Gen. 693 at 694 (1834).

[19] The close relationship between the United States and Indian Tribes is strikingly illustrated by an event described by Commissioner Collier to show the need for greater tribal autonomy, as proposed in the Department's original bill:

> In January 1923, when it had already become known that there was great oil wealth on the Navajo Reservation, the Secretary of the Interior by one fiat smashed the Navajo tribal government. It ceased to exist * * * He wiped it out and he dictated a new Navajo tribal council.

1934 House Hearings at 37.

This constitutional issue is really a form of the familiar "state action" issue. *Cf. Marsh v. Alabama*, 326 U.S. 501 (1946), *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). That issue becomes more acute as the Tribe lays claim to the broad powers typically associated with general purpose governments, such as zoning, taxation, and general police power regulation. Compare *Kramer v. Union Free School District*, 395 U.S. 621 (1969) and *Cipriano v. Houma*, 395 U.S. 701 (1969) with *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). *Cf. Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

So long as tribal powers over non-Indians remain confined to those which Congress has expressly delegated — as in the fields of liquor and environmental regulation, discussed above (pp. 23-24 supra) — and to those based upon a narrow reading of the *Montana* exceptions (pp. 21-22, supra), exclusion of non-Indians from any role in tribal government may well be justified. But any expansion beyond those limits can be constitutionally justified only if there is as well a parallel expansion of the right to participate in that government.

The Tribe, in short, cannot have it both ways. It cannot justify exclusion of non-Indians from participation, on the grounds that tribal *self*-government justifies that exclusion, while at the same time laying claim to broad powers over those non-Indians.

CONCLUSION

For the reasons given above, the judgments of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

[H. R. 7902, 73d Cong., 2d sess.]

A BILL To grant to Indians living under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise; to provide for the necessary training of Indians in administrative and economic affairs; to conserve and develop Indian lands; and to promote the more effective administration of justice in matters affecting Indian tribes and communities by establishing a Federal Court of Indian Affairs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I — INDIAN SELF-GOVERNMENT

SECTION 1. That it is hereby declared to be the policy of Congress to grant to those Indians living under Federal tutelage and control the freedom to organize for the purposes of local self-government and economic enterprise, to the end that civil liberty, political responsibility, and economic independence shall be achieved among the Indian peoples of the United States, and to provide for cooperation between the Federal Government, the States, and organized Indian communities for Indian welfare. It is further declared to be the policy of Congress that those functions of government now exercised over Indian reservations by the Federal Government through the Department of the Interior and the Office of Indian Affairs shall be gradually relinquished and transferred to the Indians of such reservations, duly organized for municipal and other purposes, as the ability of such Indians to administer the institutions and and functions of representative government shall be demonstrated, and that those powers of control over Indian funds and assets now vested in officials of the Federal Government shall be terminated or transferred to the duly constituted governments of local Indians communities as the capacity of the Indians concerned, to manage their own economic affairs prudently and effectively, shall be demonstrated. It is further declared to be

the policy of Congress to assist in the development of Indian capacities for self-government and economic competence by providing for the necessary training of Indians, and by rendering financial assistance and cooperation in establishing Indian communities.

SEC. 2. In accordance with the foregoing purposes, the Secretary of the Interior is hereby authorized to issue to the Indians residing upon any Indian reservation or reservations or subdivision thereof a charter granting to the said community group any or all of such powers of government and such privileges of corporate organization and economic activity, hereinafter enumerated, as may seem fitting in the light of the experience, capacities, and desires of the Indians concerned; but no such charter shall take effect until ratified by a three-fifths vote at a popular election open to all adult Indians resident within the territory covered by the charter.

Upon receipt of a petition for the issuance of a charter signed by one fourth of the adult Indians residing on any existing reservations, it shall be the duty of the Secretary of the Interior to make the necessary investigations and issue a proper charter, subject to ratification, or shall proclaim the conditions upon which such charter will be issued; and such petition, with a record of the findings and of the action of the Secretary, shall be transmitted by the Secretary of the Interior to Congress: *Provided,* That whenever the Secretary of the Interior shall acquire land not comprised within any existing reservation for the purchase of establishing a new Indian community, pursuant to the authority granted by title III of this Act, he shall issue a charter to take effect at some future time and shall therein prescribe the conditions under which persons of at least one-fourth degree of Indian blood shall be entitled to become members of such community, and the acceptance of such membership by the qualified persons shall constitute an acceptance and ratification of such charter.

SEC. 3. Each charter issued to an Indian community shall define the territorial limits of the community and the criteria of membership within the community; shall, wherever such community is sufficiently populous and endowed

with sufficient territory to make the establishment of local government possible, prescribe a form of government adapted to the needs, traditions, and experience of such community; and shall guarantee the civil liberties of minorities and individuals within the community, including the liberty of conscience, worship, speech, press, assembly, and association, and the right of any member to abandon the community and to receive some compensation for any interest in community assets thereby relinquished, the extent of which compensation and the manner of payment thereof to be fixed by charter provision. Each charter shall further specify the powers of self-government to be exercised by the chartered community, and shall provide for the planned extension of these powers as the community offers evidence of capacity to administer them. Each charter shall likewise prescribe the powers of management or supervision to be exercised by the chartered community over presently restricted real and personal property of individual Indians or tribes, and shall provide for the bonding of any community officials or Federal employees entrusted with the custody of community funds and for such forms of publicity and accounting, and for such continuing supervision by the Office of Indian Affairs over financial transactions and economic policies as may be found by the Secretary of the Interior to be necessary to prevent dissipation of the capital resources of the community or unjust discrimination in the apportionment of income; and each charter shall further provide for the gradual elimination of administrative supervision as the Indian community shows progress in the effective utilization of its resources and the prudent disposal of its assets.

SES. 4. The Secretary of the Interior is authorized to grant to any community which may be chartered under this Act, either by original charter or by supplement to such charter initiated or ratified by a three fourths vote, any or all of the powers hereinafter enumerated, subject to the provisions of law fixed by section 8 of this title, or any rules or regulations promulgated pursuant thereto, respecting the terms upon which certain functions of the Federal Government shall be transferred to the chartered

community, and to provide, in such original charter or supplement, for the definition, qualification, or limitation of any powers which may be granted, in any manner deemed necessary or desirable for the effectuation of the purposes and policies above set forth.

(a) To organize and act as a Federal municipal corporation, to establish a form of government, to adopt and thereafter to amend a constitution, and to promulgate and enforce ordinances and regulations for the effectuation of the functions hereafter specified, and any other functions customarily exercised by local governments.

(b) To elect or appoint officers, agents, and employees, to define the qualifications for office, to fix the salaries of officials to be paid by the community, to prescribe the qualifications of voters, to define the conditions of membership within the community, and to provide for the adoption of new members.

(c) To regulate the use and disposition of property by members of the community, to protect and conserve the property, wild life, and natural resources of the community, to cultivate and encourage arts, crafts, and culture, to administer charity, and to protect the health, morals, and general welfare of the members of the community.

(d) To establish courts for the enforcement and administration of ordinances of the community, which courts shall have exclusive jurisdiction over all offenses of, and controversies between, members of the chartered community, under the ordinances of such community, and jurisdiction exclusive or nonexclusive over all other cases arising under the ordinances of the community, and shall have power to render and enforce judgments, criminal and civil, legal and equitable, and to punish violations of local ordinances by fine not exceeding $500, or, in the alternative, by imprisonment for a period not exceeding six months: *Provided,* That no person shall be punished for any offense for which prosecution has been begun in any other court of competent jurisdiction.

(e) To accept the surrender of the tribal, corporate, or community, interests of individual members who desire to abandon the community, and to pay a fair compensation

therefor, to act as guardian or to provide for the appointment of guardians for minor and other incompetent members of the community, and to administer tribal and individual funds and properties which may be transferred or entrusted to the community by the Federal Government.

(f) To operate, maintain, and equip any public improvement and, as a Federal agency, to condemn and take title to any lands or properties, in its own name, when necessary for any of the purposes authorized by charter, and to levy assessments for community purposes, or to require the performance of labor on community projects, in lieu of assessments.

(g) To acquire, manage, and dispose of property, subject to applicable laws restricting the alienation of Indian lands and the dissipation of Indian resources, to make contracts, to issue nontransferable certificates of membership, to declare and pay out dividends, to adopt and use a corporate seal which shall be judicially noticed in all Federal courts, to sue and be sued in its own name, to employ counsel and to pay counsel fees not in excess limits to be fixed by charter provision, to have succession until its membership may become extinct, and to exercise any other privileges which may be granted to membership or business corporations.

(h) To compel the transfer from the community for inefficiency in office or other cause, of any employee of the Federal Indian Service locally assigned; to regulate trade and intercourse between members of the community and nonmembers; and to exclude from the territory of the community, with the approval of the Secretary of the Interior, nonmembers whose presence endangers the health, security, or welfare of the community: *Provided, however,* That nothing in this section or in this Act shall be construed to forbid the service in the territory of any Indian community of any civil or criminal process of any court having jurisdiction over any person found therein.

(i) To exercise any other power now or hereafter delegated to the Office of Indian Affairs, or any officials thereof, to contract with governmental bodies of State or Nation for the reception or performance of public services,

and to act in general as a Federal agency in the administration of Indian Affairs, upon the condition, however, that the United States shall not be liable for any act done, suffered to be done, or omitted to be done by a chartered Indian community.

(j) To exercise any other powers, not inconsistent with the Constitution and laws of the United States, which may be necessary or incidental to the execution of the powers above enumerated.

An Indian community chartered under this Act shall be recognized as successor to any existing political powers heretofore exercised over the members of such community by any tribal, or other native political organizations comprised within the said community, not withheld by such tribal or other native political organization, and shall, subject to the terms of said charter, further be recognized as successor to all right, interest, and title to all funds, property, choses in action, and claims against the United States heretofore held by the tribes or other native political organizations comprised within the community, or to a proportionate share thereof, except as such succession may be limited by the charter, subject to existing provisions of law with respect to the maintenance of suits against the United States, and subject further to such provision for the apportionment of such assets among nonmembers of the community having vested rights therein, as may be prescribed by the charter.

SEC. 5. When any Indian community shall have been chartered, it shall be the duty of the Commissioner of Indian Affairs to cause regular reports concerning their respective functions to be made to the constituted authorities of the community, to advise and consult with such authorities on problems of local administration and Federal policy, and to allow such authorities free access to the records and files of the local agency.

Any Indian community shall have the power to compel the transfer from the community of any persons employed in the administration of Indian affairs within the territorial limits of the community other than persons appointed by the community: *Provided, however,* That the Commissioner of Indian Affairs may prescribe such conditions for the exercise of this power as will assure to employees of the Indian Service a reasonable security of tenure, an opportunity to demonstrate their capacities over a stated period of time, and an opportunity to hear and answer complaints and charges.

SEC. 6. The Secretary shall prepare annual estimates of expenditures for the administration of Indian affairs, including expenditures for functions and services administered by an Indian community, pursuant to the authority conferred by section 8 of this title. It shall be the duty of the Secretary to transmit to the authorized representative of an Indian community any estimates and justifications thereof for expenditures to be made in whole or in part within the territorial limits of the community. Any recommendation of the authorized representatives of the community, including the approval or rejection of any item in whole or in part, or the recommendation of any other expenditures, shall be transmitted by the Secretary to the Bureau of the Budget and to the Congress concurrently with the submission of the estimates of the Secretary.

The Secretary shall also transmit to the authorized representatives of an Indian community a copy of any bill, or amendment of a bill, for the benefit of Indians, authorizing in whole or in part, the appropriation or expenditure, within the territorial limits of such community, of any funds from the Federal Treasury for which the Secretary of the Interior has submitted no estimates, and the Secretary shall transmit their written recommendations to the Congress.

The Secretary shall also transmit to the authorized representatives of an Indian community a description of any project involving the expenditure, in whole or in part, of any funds appropriated for the general welfare within the territorial limits of the community.

No expenditure hereafter authorized or appropriated for by Congress shall be charged against any such Indian community as a reimbursable debt, unless such appropriation and expenditure have been recommended or approved by such Indian community through its duly constituted au-

thorities; and any funds of the community deposited in the United States Treasury shall be expended only by the bonded disbursing agent of such community.

SEC. 7. The Secretary of the Interior may from time to time delegate to any Indian community, within the limits of its competence as defined by charter, the authority to perform any act, service, or function which the United States administers for the benefit of Indians within the territorial limits of the community and may enter into annual agreements with the constituted authorities of the community with respect to the terms and conditions of such delegation.

SEC. 8. The Commissioner is authorized and directed to proceed immediately after the passage of this Act, to arrange and classify the various functions and services administered for Indians by the United States into divisions and subdivisions which may be separably transferred. The Commissioner is further authorized and directed to proceed, immediately after the passage of this Act, to make a study and investigation of the conditions upon which separable functions and services may be transferred to the Indian communities and thereupon to promulgate, direct, and express rules and regulations to govern such transfer.

The said rules and regulations shall set forth all conditions reasonably necessary to assure the satisfactory and continued administration of the function or service transferred. The said rules and regulations shall include standards of fitness for Indians with respect to health, age, character, knowledge, and ability, for any position maintained, now or hereafter, before or after transfer to an Indian community, for the administration of functions or services within the territorial limits of any community, and a classification of all positions for which the requisite knowledge and training may be acquired by Indians through experience or apprenticeship in the position. The said rules and regulations shall also set forth for each separable function or services, a condition of its transfer, the positions for which Indians shall qualify and the required number of qualified Indians for each such position, provisions assuring a reasonable security of tenure, and any

other conditions reasonably necessary to assure the continued and the satisfactory administration of transferred functions or services.

Any Indian community may, through procedure set up in its charter, appoint a member to any vacant position under the Indian Service maintained for the administration of functions or services for Indians within the territorial limits of the community. The appointee shall not take office until he shall have previously received the certificate of approval of his fitness for the position in question from the Commissioner. The Commissioner shall issue such certificate of approval to any member of an Indian community recommended by the duly authorized representatives of the community and who is qualified for the position under the rules and regulations prescribed pursuant to this section.

Any Indian community may, upon a three-fourths vote at a popular election open to all adult members, request the transfer of any separable function or service, and the Secretary of the Interior shall transfer such function or service and, if necessary, confer by supplement to the community charter, the legal capacity to exercise such function or service, subject only to the following terms and conditions;

(a) The community must comply with all conditions prescribed by the rules and regulations of the Secretary of the Interior pursuant to the authority of this section. The community may transmit to the Congress any objection it may have to the conditions imposed, together with its budget recommendations for the next fiscal year.

(b) The Secretary of the Interior shall certify to the Secretary of the Treasury the amount of any sums or any unexpended balance of such sums theretofore or thereafter expressly appropriated, or the proportionate share of any general appropriation, for the administration of such function or service within the territorial limits of the community. The Secretary of the Treasury shall place such sums to the credit of the community, to be paid out on the requisition of the bonded disbursing agent of the community. The expenditure of such funds shall be subject to all Fed-

eral laws and regulations governing the expenditures of Federal appropriations.

(c) The Commissioner shall aid and advise the community, and the local Federal employees shall cooperate in any feasible manner at the request of the community, in the administration of the function or service transferred. The Commissioner shall also make available to the Indian community any facilities, including any lands, buildings, and equipment previously used but no longer needed by the United States in the administration of Indian affairs within the community.

(d) Whenever the Secretary of the Interior shall determine that the community has failed to comply with the conditions imposed for the continued administration of the function or service transferred, the Secretary or the Commissioner of Indian Affairs shall reassume the administration of such function or service and the Secretary shall report to the next regular session of the Congress with appropriate recommendations.

(e) The community, or its duly authorized representatives, shall make on or before September 1 of each year, an annual report for the fiscal year ended June 30, previously, to the Secretary, concerning the administration of the function or service transferred to the community, including an account by the disbursing agent of the community of receipts and expenditures of moneys placed to the credit of the community under this section.

(f) The Secretary of the Interior shall make an annual report to Congress on the administration of the functions and services transferred to the community, and shall include in such reports the reports of the Indian communities required by paragraph (e) of this section.

SEC. 9. The Secretary and the Commissioner shall continue to exercise all existing powers of supervision and control over Indian affairs now entrusted to them or either of them which are not transferred by charter or supplement thereto or by Act of Congress to organized Indian communities, and shall have power to enforce by administrative order or veto, if so provided within the charter, or, in any event, by legal process in any court of competent

jurisdiction, all provisions contained in a charter for the protection of the rights of minorities within the community, all provisions therein contained for the conservation of the resources of the community, and all other provisions that limit, qualify, or restrict the powers granted to the community.

SEC. 10. The Secretary of the Interior may, upon granting a charter to an Indian community, convey or confirm to such community, as an agency of the Federal Government, any right, interest, or title in property which may be held by the United States in trust for members of the community, and in any lands, buildings, or equipment previously used by the United States in the administration of Indian affairs within the community, and in any liens or credits of the United States held by virtue of loans to or expenditures on behalf of Indian members of the said community.

SEC. 11. Nothing in this Act shall be construed as rendering the property of any Indian community or of any member of such community subject to taxation by any State or subdivision thereof, or subject to attachment or sale under legal process, or as an expression of intent on the part of the United States to abandon the duties and responsibilities of guardianship of any Indians becoming members of chartered communities.

SEC. 12. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, not to exceed $500,000 in any one fiscal year, to be expended at the order of the Secretary of the Interior, and with the consent of the Indian communities concerned, in defraying the expenses of the organization and development of communities chartered under this Act, including the construction and furnishing of community buildings, the purchase of clerical supplies, and the improvement of community lands.

SEC. 13. The following definitions of terms used in this title shall be binding in the interpretation of this statute:

(a) The term "Commissioner" whenever used in this Act shall be taken to refer to the Commissioner of Indian Affairs, and the term "Secretary" to the Secretary of the In-

terior, and the terms "Commissioner" and "Secretary" whenever used in this Act in reference to the exercise of any power shall be construed as authorizing the delegation of such power to subordinate officials.

(b) The term "Indian" as used in this title to specify the persons to whom charters may be issued, shall include all persons of Indian descent who are members of any recognized Indian tribe, band, or nation, or are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one fourth or more Indian blood, but nothing in this definition or in this Act shall prevent the Secretary of the Interior or the constituted authorities of a chartered community from prescribing, by provision of charter or pursuant thereto, additional qualifications or conditions for membership in any chartered community, or from offering the privileges of membership therein to nonresidents of a community who are members of any tribe, wholly or partly comprised within the chartered community.

(c) The term "residing upon any Indian reservation" as used in this title to specify the persons to whom charters may be issued shall signify the maintaining of a permanent abode at the time of the issuance of a charter and for a continuous period of at least one year prior to February 1, 1934, and subsequent to September 1, 1932, but this definition may be modified by the Secretary of the Interior with respect to Indians who may reside on lands acquired subsequently to February 1, 1934.

(d) The term "charter" is used in this Act shall denote any grant of power by the United States, whether or not such power includes the privilege of corporate existence.

(e) The "three-fifths vote" required for ratification of a charter and the "three-fourths vote" required for proposal or ratification of any supplement thereto or transfer of any Federal function or service shall be measured with reference to the total number of votes cast; the chartered community, or, if the community has not yet been chartered, the Secretary of the Interior shall designate the time, place

and manner of voting, shall declare the qualifications of voters, and shall be the final judge of the eligibility of voters and of the validity of ballots.

(f) The term "disposition of property" as used in this title shall denote any transfer of property by devise or intestate succession, as well as transfer inter vivos.

(g) The term "punish" as used in this title shall not be construed to affect the amount or extent of civil judgments.

(h) The term "public" as used in this title shall include all matters affecting either the property owned or controlled by a chartered community, or the health, morals, or welfare of a considerable part of the membership of such community.

(i) The term "dividend" as used in this title shall be construed to include any distribution of funds by a chartered community out of current or accrued income and any other distribution of funds which may be approved by the Secretary of the Interior.

(j) The power "to sue and be sued" as used in this title shall not be construed to grant to the courts of any State any jurisdiction over a chartered community or the members thereof not now possessed over an Indian tribe or its members, nor to sanction execution upon the assets of the community, nor shall this power be construed to deny the right of the United States to intervene in any suit or proceeding in which it now has the right to intervene.

(k) The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, band, nation, pueblo, or other native political group or organization.

(l) The term "reservation" wherever used in this Act shall be construed to comprise all the territory within the outer boundaries of any Indian reservation, whether or not such property is subject to restrictions on alienation and whether or not such land is under Indian ownership.

(m) The term "territory of a chartered community" wherever used in this Act shall be construed to comprise all lands, waters, highways, roads, and bridges within the boundaries of an Indian community as fixed by charter, regardless of whether the title to such property is in the

United States, an Indian tribe or community, a restricted Indian or the heirs of a restricted Indian, or whether it is in a fee-patent Indian, or any other person, agency, or government.

(n) The term "transfer" as used in this title to apply to any function or service shall designate the relinquishment by the Secretary of the Interior or the Commissioner of Indian Affairs of any rights and duties incident to the performance of such function or service and the assumption of such rights and duties by the Indian community as an agency of the Federal Government.

Title II — Special Education for Indians

Section 1. The Commissioner is authorized and directed to make suitable provision for the training of Indian members of chartered communities and other Indians of at least one-fourth degree of Indian blood, in the various services now intrusted to the Office of Indian Affairs and in any additional services which may be undertaken by a chartered Indian community, including education, public-health work, and other social services, the administration of law and order, the management of forests and grazing lands, the keeping of financial accounts, statistical records, and other public reports, and the construction and maintenance of buildings, roads, and other public works. The Commissioner may use the staffs and facilities of existing Indian boarding or day schools for such special instruction, and he may provide for the training and education of Indian students in universities, colleges, schools of medicine, law, engineering, or agriculture, or other institutions of recognized standing and may subsidize such training and education under the following conditions:

(a) The Commissioner shall extend financial aid and assistance on the basis of financial need to qualified Indians for the payment of tuition and other costs of education, including necessary costs of support. One half of the amount so expended shall be a non-interest-bearing, reimbursable loan to be repaid in installments whenever the beneficiary shall have received employment anywhere, but

the obligation shall be temporarily suspended during any period of unemployment.

There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $50,000 annually to defray subsidies made under the foregoing paragraph.

(b) Notwithstanding the provisions of paragraph (a) of this section, the Commissioner may grant scholarships to any qualified Indian of special promise, no part of which shall be reimbursable.

There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $15,000 annually to defray the cost of scholarships awarded under the foregoing paragraph.

Formal contracts shall not be required for compliance with section 3744 of the Revised Statutes (U.S.C., title 11, sec. 16), with respect to the grants of subsidies or scholarships to Indian students under the foregoing provisions.

Sec. 2. It is hereby declared to be the purpose and policy of Congress to promote the study of Indian civilization and preserve and develop the special cultural contributions and achievements of such civilization, including Indian arts, crafts, skills, and traditions. The Commissioner is directed to prepare curricula for Indian schools adapted to the needs and capacities of Indian students, including courses in Indian history, Indian arts and crafts, the social and economic problems of the Indians, and the history and problems of the Indian Administration. The Commissioner is authorized to employ individuals familiar with Indian culture and with the contemporary social and economic problems of the Indians to instruct in schools maintained for Indians. The Commissioner is further directed to make available the facilities of the Indian schools to competent individuals appointed or employed by an Indian community to instruct the elementary and secondary grades in the Indian arts, crafts, skills, and traditions. The Commissioner may contribute to the compensation of such individuals in such proportion and upon such terms and conditions as he may deem advisable. For this purpose the

Commissioner may use moneys appropriated for the maintenance of such schools.

Title III — Indian Lands

Section 1: It is hereby declared to be the policy of Congress to undertake a constructive program of Indian land use and economic development, in order to establish a permanent basis of self-support for Indians living under Federal tutelage; to reassert the obligations of guardianship where such obligations have been improvidently relaxed; to encourage the effective utilization of Indian lands and resources by Indian tribes, cooperative associations, and chartered communities; to safeguard Indian lands against alienation from Indian ownership and against physical deterioration; and to provide land needed for landless Indians and for the consolidation of Indian landholdings in suitable economic units.

Sec. 2. Hereafter no tribal or other land of any Indian reservation or community created or set apart by treaty or agreement with the Indians, act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Sec. 3. The Secretary of the Interior is authorized to withdraw from disposal the remaining surplus lands of any Indian reservation heretofore opened or authorized to be opened, to sale, settlement, entry, or other form of disposal by Presidential proclamation, or under any of the public land laws of the United States. Any land so withdrawn shall have the status of tribal or community lands of the tribe, reservation, or community within whose territorial limits they are located: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act.

The Secretary of the Interior shall determine what lands, lying outside of areas classified for consolidation under Indian ownership pursuant to section 6 of this title, are not needed by the Indians, and such lands shall be reopened to sale, settlement, entry, or other lawful form of disposal in accordance with existing law.

Sec. 4. The existing periods of trust placed upon Indian allotments and unallotted tribal lands and any restriction of alienation thereof, are hereby extended and continued until otherwise directed by Congress. The authority of the Secretary of the Interior to issue to Indians patents in fee or certificates of competency or otherwise to remove the restrictions on lands allotted to individual Indians under any law or treaty is hereby revoked.

No lands or other capital assets owned by an Indian community, or any interest therein, shall be voluntarily or involuntarily alienated: *Provided, however,* That the community may grant the use of the surface of, or any mining privileges in, any land to a nonmember, by lease or revocable permit for a period not to exceed one year, or, with the approval of the Secretary, for a longer period, and may, with the approval of the Secretary, sell or contract to sell to a nonmember any standing timber, or dispose of any capital improvements, owned by the community.

Sec. 5. No sale, devise, gift, or other transfer of Indian lands held under any trust patent or otherwise restricted, whether in the name of the allottee or his heirs, shall be made or approved: *Provided, however,* That such lands may, with the approval of the Secretary, be sold, devised, or otherwise transferred to the Indian tribe from whose lands the allotment was made or the chartered community within whose territorial limits they are located: *And provided further,* That the Secretary of the Interior may authorize exchanges or lands of equal value whenever such exchange is in his judgment necessary for or compatible with the proper consolidation of Indian lands classified for the purpose pursuant to the authority of section 6 of this title.

Sec. 6. The Secretary of the Interior is authorized and directed to classify areas of land allotted in whole or in part now under restricted Indian ownership which are reasonably capable of consolidation into suitable units for grazing, forest management, or other economic purposes, and to proclaim the exclusion from such areas of any lands not to be included therein. In order to bring about an orderly and sound acquisition and consolidation of lands and

to promote the effective use of Indian resources and the development of Indian economic capacities, the Secretary is hereby authorized and directed to make economic and physical investigation and classification of the existing Indian lands, of intermingled and adjacent non-Indian lands and of other lands that may be required for landless Indian groups or individuals; to make necessary maps and surveys; to investigate Indian aptitudes and needs in the agricultural and industrial arts, in political and social affairs and in education, and to make such other investigations as may be needed to secure the most effective utilization of existing Indian resources and the most economic acquisition of additional lands. In carrying out the investigations prescribed in this section the Secretary is authorized to utilize the services of any Federal officers or employees that the President may assign to him for the purpose, and is further authorized, with the consent of the States concerned, to enter into cooperative agreements with State agencies for similar services.

SEC. 7. The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to acquire, through purchase, relinquishment, gift, exchange, or assignment, lands or surface rights to lands, within or outside of existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians for whom reservation or other land is not now available and who can make beneficial use thereof, and for the purpose of blocking out and consolidating areas classified for the purpose pursuant to the authority of section 6 of this title. The Secretary is authorized, in the case of trust or other restricted lands or lands to which fee patents have hitherto been issued to Indians and which are unencumbered, to accept voluntary relinquishments of, and to cancel the patent or patents or any other instrument removing restrictions from the land.

There is hereby authorized to be appropriated, for the acquisition of such lands and for expenses incident thereto, including appraisals and the investigations provided for in section 6 of this title, a sum not to exceed

$2,000,000 for any one fiscal year. The unexpended balances of appropriations made for any one year pursuant to this Act shall remain available until expended.

The Secretary of the Interior is hereby authorized to accept voluntary relinquishments from any Indian allottee or Indian homestead entryman, or from his heirs, of all rights in and to any land included in any Indian public domain allotment, homestead, or application therefor, which has heretofore or may hereafter be made, where such land lies within the exterior boundaries of any Indian reservation or area heretofore or hereafter set apart and reserved for the use and benefit of any Indian tribe or band; and the Secretary of the Interior is hereby authorized and empowered to cancel any patent which may have been issued conveying such land, or any interest therein, to any Indian allottee or Indian homestead entryman.

Title to any land acquired pursuant to the provisions of this section shall be taken in the name of the United States in trust for the Indian tribe or community for whom the land is acquired, but title may be transferred by the Secretary to such community under the conditions set forth in this Act.

SEC. 8. Any Indian tribe or chartered Indian community is authorized to purchase or otherwise acquire any interest of any member or nonmember in land within its territorial limits, and may expend any tribal or community funds, whether or not held in the Treasury of the United States, for this purpose, whenever, in the opinion of the Secretary of the Interior the acquisition is necessary for the proper consolidation of Indian lands.

The Secretary of the Interior is authorized to transfer to any Indian tribe or community, and to accept on behalf of the tribe or community, any member's interest in restricted farming, grazing, or timberlands, and shall issue a non-transferable certificate in exchange, evidencing a proportionate interest in tribal or community lands of similar quality, if in his opinion such transfer is necessary for the proper consolidation of Indian lands: *Provided, however,* That any Indian making beneficial use of such transferred lands shall be entitled to continue the occupancy and use

of such lands, and to any improvements thereon, or to receive adequate compensation for such improvements, subject to the provisions of section 14 of this title. For the purpose of this section "proportionate interest" shall be construed to mean a right to use or to receive the income from an equivalent amount of tribal or community land of similar quality or to receive the money value of any lawful disposition of the interest transferred if such right of use is not exercised. A member's proportionate interest may descend to the heirs of such member but not to any nonmember, and his right of use of transferred land, if exercised, may similarly descend to the heirs of such member.

The Secretary of the Interior may sell and convey to an Indian, to an Indian tribe, or community, any restricted lands inherited by any member, whenever, in his opinion, the sale is necessary for the proper consolidation of Indian lands.

The time and mode of payment of the purchase price of any lands authorized to be sold or purchased under this section shall be governed by the agreement between the parties, but insofar as practicable the purchase price shall be paid in annual installments equal to the estimated annual proceeds realizable from any lawful disposition of the land, and the vendor, if a member, may accept any right of use in tribal or community lands as satisfaction of the purchase price in whole or in part.

SEC. 9. The Secretary of the Interior shall assign the use of tribal or community lands to any member according to the right or interest of such member for a period not to exceed the life of the assignee and shall make rules and regulations governing such assignments. The Secretary of the Interior may in addition assign to any such member the right of exclusive occupancy of any community lands for farming or domestic purposes in proper economic units: *Provided*, That any Indian making beneficial use of land shall be entitled to preference in the assignment of the use of such land and to any improvements thereon or to adequate compensation for such improvements.

All rights of exclusive occupancy of, and all physical improvements lawfully erected on, tribal or community

lands, shall descend according to rules of descent and distribution to be prescribed by the Secretary of the Interior.

SEC. 10. Wherever the Secretary shall find that existing State laws governing the determination of heirs, so far as made applicable to any restricted Indian lands by congressional enactment, are not adapted to Indian needs and circumstances, he may promulgate independent rules governing such determination, including such rules as may be necessary to prevent any subdivision of rights to lands or improvements thereon where is likely to impair their beneficial use.

The Secretary may delegate to a chartered Indian community the authority conferred by this section.

SEC. 11. On and after the effective date of the passage of this Act, and beginning with the death of the person presently entitled, all right, interest, and title in restricted allotted lands, but not including any proportionate interest acquired pursuant to section 8 of this title or any improvements lawfully erected, shall pass to the chartered community within whose territorial limits such lands are located or, if no community has been chartered, to the tribe from whose lands the allotment was made: *Provided, however,* That individuals who would be otherwise entitled, save for the provisions of this section, shall acquire a contingent interest in such lands, and title to any such lands shall vest in such individuals when and only when the Secretary shall determine that such lands lie outside any area classified for consolidation pursuant to section 6: *And provided further,* That prior to such determination the individuals otherwise entitled shall enjoy the use and income realized from any lawful disposition of such lands.

The Secretary shall issue to the individuals otherwise entitled to nontransferable certificate evidencing a descendible interest in tribal or community lands of similar quality in the proportion which the acreage of the farming grazing, or timber lands, whichever, passing to the tribe or community at any time bears to the total tribal or community acreage of farming, grazing, or timber lands: *Provided, however,* That such persons shall enjoy a preference in the assignment of lands passing to the tribe or community in

accordance with the provisions of this section.

No will purporting to make any other disposition of such lands shall be approved.

SEC. 12. The Secretary of the Interior is authorized and directed to issue to each member of an Indian tribe or community which owns or controls lands allotted in whole or in part a nontransferable certificate evidencing the member's right to an equal interest in all tribal or community assets, including the right to make beneficial use of a proportionate share thereof: *Provided, however,* That in the administration of sections 8, 9, 10, and 11 of this title, members so entitled may be given the right to actual beneficial use of more than their proportionate shares of such tribal or community lands and resources: *And provided further,* That in the administration of sections 8, 9, 10 and 11 of this title, appropriate deductions may be made from the undivided interest of any member proportionate in value to any special interest acquired or inherited by such member, in exchange for property passing, transferred, or sold, to a tribe or community, or any restricted lands retained in severalty by such member.

SEC. 13. Each certificate issued pursuant to the authority of any section of this title shall be issued in triplicate, one copy of which the Secretary of the Interior shall retain in a register to be kept for the purpose and the others of which he shall forward to the tribe or chartered Indian community. The said tribe or community shall deliver to the Indian in whose favor it is issued one of such certificates so forwarded and shall cause the other to be copied into a register of the tribe or community to be provided for the purpose, and shall file the same.

The Secretary may delegate to a chartered community the authority conferred by this section and may countersign certificates of interest issued by such community to its members.

SEC. 14. The Secretary of the Interior is authorized and directed to classify and divide the lands owned or controlled by an Indian tribe or community into economic units suitable for farming, grazing, forestry, and other purposes, and may lease or permit the use of, and may regulate the use and management of such lands whenever in his opinion necessary to promote and preserve their economic use. The Secretary may delegate to a chartered Indian community the authority conferred by this section.

SEC. 15. The Secretary of the Interior is authorized and directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range for deterioration, to prevent soil erosion, and like purposes. The Secretary may delegate to a chartered Indian community the authority conferred by this section.

SEC. 16. The Secretary of the Interior is authorized to proclaim new Indian reservations on lands purchased for the purposes enumerated in this Act, or to add such lands to the jurisdiction of existing reservations. Such lands, so long as title to them is held by the United States or by an Indian tribe or community, shall not be subject to taxation, but the United States shall assume all governmental obligations of the State or county in which such lands are situated with respect to the maintenance of roads across such lands, the furnishing of educational and other public facilities to persons residing thereon, and the execution of proper measures for the control of fires, floods, and erosion, and the protection of the public health and order in such lands, and the Secretary of the Interior may enter into agreements with authorities of any State or subdivision thereof in which such lands are situated for the performance of any or all of the foregoing functions by such State or subdivision or any agencies or employees thereof authorized by the law of the State to enter into such agreements, and for the payment of the expenses of such functions where appropriations therefor shall be made by Congress.

SEC. 17. Nothing contained in this title shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic

boundaries of any Indian reservation now existing or to be established hereafter.

SEC. 18. Whenever used in this title the phrase "a member of an Indian tribe" shall include any descendant of a member permanently residing within an existing Indian reservation.

SEC. 19. Whenever used in this title the phrase "lands owned or controlled by an Indian tribe or community" shall include all interest in land of any of its members.

SEC. 20. The provisions of this Act shall not be construed to prevent the removal of restrictions on taxable lands of members of the Five Civilized Tribes nor operate to effect any change in the present laws and procedure relating to the guardianship of minor and incompetent members of the Osage and Five Civilized Tribes, but in all other respects shall apply to such Indians.

SEC. 21. None of the provisions of this Act, except the provisions of Title II, relating to Indian education, shall apply to the Indians of New York State.

TITLE IV — COURT OF INDIAN AFFAIRS

SECTION 1. There shall be a United States Court of Indian Affairs, which shall consist of a chief judge and six associate judges, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive an annual salary of $7,500 payable monthly from the Treasury.

SEC 2. The said Court of Indian Affairs shall always be open for the transaction of business and sessions thereof may, in the discretion of the court, be held in the several judicial circuits and at such places as said court may from time to time designate. The authority of the court may be exercised either by the full court or by one or more judges duly assigned by the court to sit in a particular locality or to hold a special term for a designated class of cases.

SEC 3. The Court of Indian Affairs shall have original jurisdiction as follows:

(1) Of all prosecutions for crimes against the United States committed within the territory of any Indian reservation or chartered Indian community, whether or not committed by an Indian;

(2) Of all cases to which any Indian tribe or chartered Indian community is a party;

(3) Of all cases at law or in equity arising out of commerce with any Indian tribe or community or members thereof, wherein a real party in interest is not a member of such tribe or community;

(4) Of all cases, civil or criminal, arising under the laws or ordinances of a chartered Indian community, wherein a real party in interest is not a member of such community;

(5) Of all actions at law or suits in equity wherein the pleadings raise a substantial question concerning the validity or application of any Federal law, or any regulation or charter authorized by such law, relating to the affairs or jurisdiction of any Indian tribe or chartered community;

(6) Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty;

(7) Of all cases involving the determination of heirs of deceased Indians and the settlement of the estates of such Indians; of all cases and proceedings involving the partition of Indian lands, or the guardianship of minor and incompetent Indians; and of all cases and proceedings to determine the competency of individual Indians where the issuance of cancelation of a fee patent or the removal of restrictions from inherited or allotted lands, funds, or other property held by the United States in trust for such Indians may be involved: *Provided*, That the Court of Indian Affairs shall exercise no jurisdiction in cases over which exclusive jurisdiction has been granted by Congress to the Court of Claims, or to any other Federal court other than the United States district courts, or in cases over which exclusive jurisdiction may be granted by charter provision to the local courts of any Indian community.

SEC. 4. All jurisdiction heretofore exercised by the United States district courts by reason of the fact that a case involved facts constituting any of the grounds of jurisdiction enumerated in the preceding section, is hereby terminated, reserving, however, to such district courts

complete jurisdiction over all pending suits and over all proceedings ancillary or supplementary thereto.

SEC. 5. The Court of Indian Affairs may order the removal of any cause falling within its jurisdiction as above set forth, from any court of any State or any Indian community in which such cause may have been instituted.

SEC. 6. The Court of Indian Affairs shall have jurisdiction to hear and determine appeals from the judgment of any court of any chartered Indian community in all cases in which said Court of Indian Affairs might have exercised original jurisdiction.

SEC. 7. The procedure of the Court of Indian Affairs shall be determined by rules of court to be promulgated by it, existing statutes regulating procedure in courts of the United States notwithstanding. Such rules shall regulate the form and manner of executing, returning, or filing, writs, processes, and pleadings; the removal of causes specified in section 5; the taking of appeals specified in section 6; the joinder of parties and of causes of action, legal and equitable, the interposition of defenses and counterclaims, legal and equitable; the raising of questions of law before trial; the taking of testimony by examination before trial and other proceedings for discovery and inspection; the issuance of subpoenas to summon witnesses and compel the production of documents at trial; the summoning of jurors and the waiver of jury trial; the form and manner of entry of judgments; the manner of executing judgments; the conduct of supplementary proceedings; the survival of actions and the substitution of parties; the amounts and manner of payment of fees to the clerk or the marshal of the court; the practice of attorneys; and such other matters as may require regulation in order to provide a complete system of procedure for the conduct of the court. In general the rules of court shall conform as nearly as possible to the statutes regulating the procedure in the district courts of the United States, the rules of the Supreme Court governing causes in said district courts, and the practice in the courts of the State in which the controversy arises, save that the rules shall so far as possible, be nontechnical in character and fitted to the needs of prospective litigants.

SEC. 8. The court may provide, by rules to be promulgated by it, for appeals to the full court from judgments rendered on circuit by less than a majority of the full court.

SEC. 9. All substantial rights accorded to the accused in criminal prosecutions in the district courts of the United States shall be accorded in prosecutions in the Court of Indian Affairs. The trial of offenses punishable by death or by imprisonment for a period exceeding five years shall be had within or in the vicinity of the reservation or Indian community where the offense was committed.

SEC. 10. In both civil and criminal causes, the right to trial by jury and all other procedural rights guaranteed by the Constitution of the United States shall be recognized and observed.

SEC. 11. In criminal cases the rules of evidence shall be those prevailing in criminal cases in the United States district courts. In civil cases the common law rules of evidence, including the rules governing competency of witnesses, shall prevail: *Provided, however,* That the court shall have the power to amend such rules by rule of court or judicial decision to make them conform as nearly as possible to modern changes evidenced by the statutes and decisions of the United States and the several States, and to adapt them, where necessary, to the solution of problems of proof peculiar to the cases before the court.

SEC. 12. The statutes and decisions of the several States, except where the Constitution, treaties, or statutes of the United States, or the charters or ordinances of Indian communities or orders of executive departments thereunder promulgated, otherwise require or provide, shall be regarded as rules of decision in all civil cases in the Court of Indian Affairs.

SEC. 13. The Court of Indian Affairs shall be a court of record possessed of all incidental powers, including the power to summon jurors, to administer oaths, to have and use a judicial seal, to issue writs of habeas corpus, to punish for contempt, and to hold to security of the peace and for good behavior, which may be exercised by the district courts of the United States, and such powers shall be subject to all limitations imposed by law upon said district

courts. The orders, writs, and processes of the Court of Indian Affairs may run, be served, and be returnable anywhere in the United States. The said court shall perform such administrative functions as Congress may assign to it. The said court shall have the power to render declaratory judgments, and such judgments, in cases of actual controversy, shall have the same force as final judgments in ordinary cases.

SEC. 14. The judges of the Court of Indian Affairs shall hold office for a period of ten years; they may be removed prior to the expiration of their term by the President of the United States, with the consent of the Senate, for any cause.

SEC. 15. The final judgment of the Court of Indian Affairs shall be subject to review on questions of law in the circuit court of appeals of the circuit in which such judgment is rendered. The several circuit courts of appeals are authorized to adopt rules for the conduct of such appellate proceedings, and, until the adoption of such rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern. The said circuit of courts of appeals shall have power to affirm, or, if the judgment of the Court of Indian Affairs is not in accordance with law, to modify or reverse the judgment of that court with or without remanding the case for a rehearing, as justice may require; the judgment of the circuit court of appeals shall be final, except that it may be subject to review by the Supreme Court as provided in the United States Code, title 28, sections 346 and 347.

SEC. 16. The fees of jurors and witnesses shall be fixed in accordance with the provisions of law governing such fees in United States courts generally as provided in the United States Code, title 28, sections 600 to 605.

SEC. 17. The costs and fees in the Court of Indian Affairs shall be fixed and established by said court in a table of fees: *Provided*, That the costs and fees so fixed shall not exceed, with respect to any item, the costs and fees now charged in the Supreme Court.

SEC. 18. The Court of Indian Affairs shall appoint a chief clerk, a reporter, and such assistant clerks and marshals, not to exceed seven each, as may be necessary for the efficient conduct of its business. The said officials shall be under the direction of the court in the discharge of their duties; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or if not, at the next session.

SEC. 19. The Attorney General shall provide the Court of Indian Affairs with suitable rooms in courthouses or other public buildings at such places as the court may select for its sessions.

SEC. 20. The chief clerk of the court shall, under the direction of the chief judge, employ such stenographers, messengers, or attendants and purchase such books, periodicals, and stationery as may be useful for the efficient conduct of the business of the court, and expenditures for such purposes shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by the chief judge.

SEC. 21. The judges of the Court of Indian Affairs and the clerks and marshals thereof shall receive necessary traveling expenses, and expenses not to exceed $5 per day for subsistence while traveling on duty and away from their designated stations.

SEC. 22. With respect to all matters relating to the receipt of fines, costs, fees, bail, and other payments to officials of the court, the custody of funds and the rendering of accounts therefor, the bonding of court officials charged with such custody, the payment of moneys for salaries, traveling expenses, clerical services, the publication of reports of opinions, and office expenses, the laws, departmental regulations, and rules of court applicable to similar matters in the Supreme Court shall apply to the Court of Indian Affairs except as otherwise provided in this chapter.

SEC. 23. The Secretary of the Interior is hereby authorized to appoint not to exceed ten special attorneys whose duty it shall be to advise and represent such Indian tribes or communities as the Secretary of the Interior may designate, and the individual members thereof or to represent

the United States on behalf of such tribes or communities or the individual members thereof. Within ten days of the institution of any proceedings on behalf of such tribes or communities or members thereof, the special attorneys provided for herein shall serve upon the appropriate United States district attorney written notice of the pendency of any such proceedings, together with copy of all the pleadings on file in any such proceeding.

SEC. 24. As used in this title, the term "circuit court of appeals" includes the Court of Appeals of the District of Columbia.

SEC. 25. Appropriations for the Federal Court of Indian Affairs and for incidental expenses shall be made annually based upon estimates submitted by the Attorney General and appropriations for the special attorneys shall be made annually, based upon estimates submitted by the Secretary of the Interior.

APPENDIX B

[Public—No. 383—73d Congress]

[S. 3645]

AN ACT To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further,* That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to

exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further,* That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further,* That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further,* That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further,* That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

SEC. 4. Except as herein provided, no sale, devise, gift,

exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further,* That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided,* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and

the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sum as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

SEC. 10. There is hereby authorized to be approporiated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress for transactions under this authorization.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided,* That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16 shall apply to the Territory of Alaska: *Provided,* That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affili-

ated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and

bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under suich rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or trival council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange thereof for interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or

lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot, upon thirty days notice.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1622, 87-1697, and 87-1715

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PHILIP BRENDALE, STANLEY WILKINSON,
COUNTY OF YAKIMA, et al.,

Petitioners,

v.

REPRINTED COPY

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION, et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE CITY OF GREEN BAY, WISCONSIN, THE TOWNS OF HOBART AND ONEIDA, WISCONSIN, AND THE COUNTIES OF BROWN AND OUTAGAMIE, WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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September 3, 1988

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit erred by effectively reversing the presumption applied by this Court in Montana v. United States that Indian tribes have been implicitly divested of their sovereignty to regulate non-member conduct on non-member fee land to a presumption that an Indian tribe has authority to regulate fee land owned by non-members on a "checkerboard" reservation.

2. Whether an Indian tribe may regulate the use of land lying within its original reservation boundaries but allotted and later fee patented -- notwithstanding the land's loss of Indian character and the long-standing and unquestioned exercise of regulatory jurisdiction by local governments over such land.

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE.....1

STATEMENT OF THE CASE.....12

SUMMARY OF ARGUMENT.....12

ARGUMENT.....14

I. THE NINTH CIRCUIT REVERSED THE PRESUMPTION THAT INDIAN TRIBES HAVE BEEN IMPLICITLY DIVESTED OF THEIR SOVEREIGNTY TO REGULATE NON-MEMBER CONDUCT ON NON-MEMBER FEE LAND.....14

II. DE FACTO DIVESTITURE OF TRIBAL SOVEREIGNTY TO REGULATE NON-MEMBER CONDUCT ON FEE LAND PRESUMPTIVELY OCCURS WHEN RESERVATION LAND LOSES ITS INDIAN CHARACTER.....18

A. The Ninth Circuit's Analysis Produces Illogical Results.....19

B. The Ninth Circuit's Opinion Is Legally Unsupportable Because It Conflicts With This Court's Decision In Solem.....23

CONCLUSION.....26

TABLE OF AUTHORITIES

Cases — Page

Brown-Outagamie-Oneida Jurisdiction Commission v. Purcell Powless, No. 85-C-1052 (E.D. Wis.).....9 n.11

Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987).....passim

Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, No. C-83-724-JLQ (D. Wash. May 24, 1984).....15

Montana v. United States, 450 U.S. 544 (1981).....2 n.1

New York Indians v. United States, 40 Ct. Cl. 448 (1905).....5 n.4

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).....24, 25 n.19

Solem v. Bartlett, 465 U.S. 463 (1984).....passim

Stevens v. County of Brown, No. 3807 (E.D. Wis. Nov. 3, 1933)....21

United States v. Hall, 171 F. 214 (E.D. Wis. 1909).....20

United States v. Wheeler, 435 U.S. 313 (1978).....16, 22 n.18

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).....10 n.13

Statutes

General Allotment Act of 1887, c. 119, 24 Stat. 388.....4

Act of June 21, 1906, 34 Stat. 325.....6 n.6

25 U.S.C. § 349.....6 n.6

1903 Wis. c. 339.....6 n.5

Wis. Stat. §§ 59.97, 60.61, 61.35, 62.23 (1985-86).....6 n.5, 10 n.13

Treaty

Treaty with the Oneida, February 3, 1838, 7 Stat. 566.....passim

Other Authorities

Bureau of Indian Affairs, U.S. Dep't of the Interior, Lands Under Jurisdiction of Great Lakes Agency (March 1986)...8 n.9

General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Source: United States Bureau of Indian Affairs.....8 n.9

Solberg, Rural Zoning in the United States, Agriculture Information Bulletin No. 59, pp. 2, 6, 8, 13 (1952).....10 n.13

[1893] Ann. Rep. Comm'r Indian Affairs 610.....5 n.4

Petition of Philip Brendale for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.....7 n.7

Nos. 87-1622, 87-1697, and 87-1711

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PHILIP BRENDALE, STANLEY WILKINSON, COUNTY OF YAKIMA, et al.,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE CITY OF GREEN BAY, WISCONSIN, THE TOWNS OF HOBART AND ONEIDA, WISCONSIN, AND THE COUNTIES OF BROWN AND OUTAGAMIE, WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The City of Green Bay, Wisconsin, the towns of Hobart and Oneida, Wisconsin and the Wisconsin counties of Brown and

Outagamie (collectively the "Wisconsin local governments") have a substantial and immediate interest in these cases. The United States Court of Appeals for the Ninth Circuit's apparent reversal of the presumption that Indian tribes have been implicitly divested of their sovereignty to regulate non-member conduct on non-member fee land[1] presents important questions concerning the Wisconsin local governments' authority to regulate fee land lying within their boundaries.

Included within the boundaries of the Wisconsin local governments are all 65,650 acres of land set apart by treaty for the First Christian and Orchard Parties of the Oneida Indians of Wisconsin (the "Oneidas"). A brief statement of the circumstances under which that land was set

[1] See Montana v. United States, 450 U.S. 544, 564-66 (1981).

aside reveals a somewhat atypical process, which explains both the backdrop of a current dispute between the Wisconsin local governments and the Oneidas and the local governments' interest in these proceedings.

In 1838 the Oneidas entered into a treaty with the United States pursuant to which they ceded all their title and interest in the land set apart for the New York Indians in Wisconsin. Treaty with the Oneida, February 3, 1838, 7 Stat. 566 (the "1838 Treaty"). The United States agreed to pay $33,500 for this express cession of land and to set aside from that cession "a tract of land containing one hundred (100) acres for each [Oneida] individual." Id. The total amount of land set apart pursuant

to the 1838 Treaty was approximately 65,650 acres.[2]

As early as the 1850s, the Oneidas began to petition the United States to allot their lands as, they believed, the United States had agreed to do in the 1838 Treaty. In so petitioning, the Oneidas expressed their desire to become citizens of the State of Wisconsin and subject to its laws.

In 1889, after the enactment of the General Allotment Act,[3] a majority of the adult Oneidas voted to accept allotment of the 1838 Treaty land. The United States consequently began the allotment process that year.

During the period 1889 through 1892, the United States allotted in severalty to

[2]The Oneidas contend that the 1838 Treaty created the "Oneida Indian Reservation."

[3]General Allotment Act of 1887, c. 119, 24 Stat. 388.

individual Oneidas virtually all of the 1838 Treaty land and allocated the remaining land for educational and religious use by missionaries. By 1893, the process of allotment of the land set aside under the 1838 Treaty had been completed and no surplus or tribal lands remained.[4]

During the post-allotment period, the Oneidas sought to establish municipal governments under the laws of the State of Wisconsin. Even before the completion of the allotment process, the Oneidas had applied for admission of their lands to Brown and Outagamie Counties as townships. As a result of these efforts, in 1903 the Wisconsin legislature authorized the

[4]E.g., New York Indians v. United States, 40 Ct. Cl. 448, 471 (1905); [1893] Ann. Rep. Comm'r Indian Affairs 610.

creation of the towns of Hobart and Oneida from the 1838 Treaty land.[5]

Following the passage of the Burke Act in 1906,[6] the vast majority of Oneida allottees received fee patents. By 1918, more than 1150 Oneida held fee patents for their land and only 35 allotments remained under federal trust. By 1934, only 21 allottees, all incompetent, had not received fee patents. Thus, by 1934 at the latest, virtually all of the 1838 Treaty land had been allotted, the trust period on those allotments had expired and fee patents had been issued.

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[5]1903 Wis. Laws c. 339.

[6]25 U.S.C. § 349, 34 Stat. 182 (1906). The Burke Act authorized the Secretary of the Interior to issue fee simple patents to competent Indian allottees. The authority of the Secretary to issue fee patents was affirmed and specifically applied to the Oneidas in a separate enactment later that same year. Act of June 21, 1906, 34 Stat. 325.

The composition of the land lying within the borders of the Wisconsin local governments is, therefore, a stark contrast to the respondent Yakima Indian Nation's reservation. Apparently, only four percent of the uninhabited "closed area"[7] and fifty percent of the "open area" is owned in fee simple on the Yakima Reservation.[8] Ninety-six percent of the land originally set apart for the Oneidas (63,899 acres) is today held in fee simple by non-members. The remaining four percent of the land originally reserved for the Oneidas (2751 acres now held in trust by the federal government) is interspersed among the

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[7]See Petitioner Brendale's Petition for Writ of Certiorari at p. 7.

[8]Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529, 530 (9th Cir. 1987).

parcels held in fee.[9] Accordingly, the land lies in the classic checkerboard pattern -- a pattern the Ninth Circuit found impedes the Yakima Tribe's ability to effectively engage in comprehensive land use planning unless it is permitted to regulate non-member fee land.[10]

The question of the ability of an Indian tribe to zone or otherwise regulate the conduct of non-members on fee land is of substantial importance to the Wisconsin local governments. They recently filed

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[9]Bureau of Indian Affairs, U.S. Dep't of the Interior, Lands Under Jurisdiction of Great Lakes Agency (March 1986). According to the figures of the last federal census, 1762 Oneida Indians reside on land set apart for the Oneidas in 1838, compared to 11,636 non-member residents. General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Source: United States Bureau of Indian Affairs. The Oneidas thus comprise only 13.2 percent of the population on the 1838 Treaty lands.

[10]See Confederated Tribes and Bands, 828 F.2d 529 at 534-35.

suit in the United States District Court for the Eastern District of Wisconsin seeking a declaration that any Oneida Indian Reservation which may have been established by the 1838 Treaty has been disestablished and that, accordingly, neither the Oneida Tribe of Indians of Wisconsin, nor its officials, has jurisdiction over fee-patented land within the exterior boundaries of the alleged original reservation.[11]

The Ninth Circuit's apparent reversal of the Montana presumption[12] would upset settled expectations of the residents of the Wisconsin local governments. The post-allotment history of the land originally reserved provides the basis for the

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[11]Brown-Outagamie-Oneida Jurisdiction Commission v. Purcell Powless, No. 85-C-1052 (E.D. Wis.).

[12]See text infra at 14.

residents' expectation that their conduct and land will be regulated by the Wisconsin local governments. For over fifty years those governments have exercised continuous regulatory authority over the alienated land of the Oneidas, which long ago lost any Indian character.[13]

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[13]After the allotment of virtually all of the land set apart pursuant to the 1838 Treaty and the Oneidas' acceptance of the local governments' regulatory authority, Wisconsin recognized a need for and became a pioneer in rural zoning. In 1923, the Wisconsin legislature became the first state body to authorize zoning outside the boundaries of incorporated municipalities. Solberg, Rural Zoning in the United States, Agriculture Information Bulletin No. 59, pp. 2, 6, 8, 13 (1952). The legislature passed enabling laws granting zoning power to both counties and towns. See Wis. Stat. §§ 59.97 (Counties), 60.61 (Towns), 61.35 (Villages), 62.23 (Cities) (1985-86). Since that time the Wisconsin local governments have exercised their police power, through the enactment of zoning ordinances, to protect the health, safety and welfare of their residents -- Oneida Indians and non-Indians alike -- while affording them the political protection of the elective process. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-89 (1926).

Until recently the Oneida Indians not only fully acquiesced in this exercise of regulatory authority, but also held local government office. Last year, however, the Oneida Tribe announced its intent to develop a comprehensive set of environmental regulations to be implemented within the exterior boundaries of the alleged Oneida Indian Reservation. Affirmance of the Ninth Circuit's decision would further threaten the jurisdictional balance of the Oneidas and the Wisconsin local governments and defeat the expectations of thousands of residents who trust that the land they have owned for decades will be regulated by officials for whom they vote.

STATEMENT OF THE CASE

The Wisconsin local governments adopt the statement of the case in the brief on the merits filed by Stanley Wilkinson.

SUMMARY OF ARGUMENT

This Court has held that Indian tribes have been implicitly divested of their sovereignty to regulate non-member conduct on land owned in fee by non-members. Montana v. United States, 450 U.S. 544, 564-66 (1987). The United States Court of Appeals for the Ninth Circuit's decision, by disregarding factual findings of the trial court and ignoring the demographic history of the open lands, reversed that presumption and substituted a presumption that tribes may regulate non-member land to achieve "comprehensive" land use planning. Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, 828 F.2d

529 (9th Cir. 1987). As a consequence, the Ninth Circuit has unsettled the well-established expectations of non-members that their land will continue to be subject to state and local government regulation.

Moreover, the Ninth Circuit decision causes an illogical situation to arise. Because the Ninth Circuit sought secure uniform regulation of a checkerboard reservation as a goal, the likelihood that an Indian tribe can regulate non-member fee land may well increase as greater numbers of non-members own land within the boundaries of the reservation. This Court should reverse and reaffirm its holding in Montana that non-member conduct may be regulated only to protect tribal self-government and to control internal tribal relationships.

ARGUMENT

I. THE NINTH CIRCUIT REVERSED THE PRESUMPTION THAT INDIAN TRIBES HAVE BEEN IMPLICITLY DIVESTED OF THEIR SOVEREIGNTY TO REGULATE NON-MEMBER CONDUCT ON NON-MEMBER FEE LAND.

The Ninth Circuit held that the Yakima Indian Nation had the authority to zone non-member fee land because the lack of such regulation "would destroy" the Yakimas' ability to zone Indian-owned land. Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, 828 F.2d 529, 535 (9th Cir. 1987).[14] To reach this conclusion, the Ninth Circuit ignored factual findings made by the district court. The district court expressly found

[14]All of the land at issue was contained within the boundaries of the unquestioned, traditional Yakima Indian reservation. As described supra at page 3, the land reserved for the Oneidas was set apart in a less traditional manner, and the continued existence of any reservation is disputed. The Ninth Circuit did not purport to address such a non-traditional or disputed reservation.

that the evidence presented during trial did not support the Yakimas' argument that checkerboard zoning is either impossible or difficult to administer. Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, No. C-83-724-JLQ (D. Wash. May 24, 1984) (findings of fact and conclusions of law), appended to County of Yakima's Petition for a Writ of Certiorari at 50-A. The district court further found that:

> Of necessity, so-called checkerboard zoning is required in today's society, whether it be in the relations between counties and cities or towns, or between counties and Indian tribes.

Id. By ignoring such facts in reaching its conclusion, the Ninth Circuit appears to have established a legal presumption that tribes have the power to zone

"checkerboard" lands owned in fee by non-members.

Such a presumption is, however, contrary to the presumption established by this Court that tribes have been divested of the authority to regulate non-member conduct on non-member fee land. Montana v. United States, 450 U.S. 544, 564-65 (1981).[15] In Montana, this Court held that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Id. at 564; see also United States v. Wheeler, 435 U.S.

[15]The Wisconsin local governments do not express an opinion on the Ninth Circuit's decision to the extent that the court has relied upon any treaty rights specifically granted to the Yakima Indian Nation for its finding that the Yakimas possessed the authority to regulate land use.

313, 326 (1978) ("The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe."). The Ninth Circuit appears not to have required a demonstration that zoning of non-member fee land is necessary to protect tribal self-government or control internal relationships, but to have presumed the existence of the power, based upon the tribe's interest in regulating its own lands. 828 F.2d at 534 (quoting Segundo v. Rancho Mirage, 813 F.2d 1387, 1393 (9th Cir. 1987) and comparing the tribe to a local government). Such an analysis squarely conflicts with this Court's prior holding in Montana that only the demonstrated need for protection of tribal self-government or control of internal

relations warrants the exercise of tribal power over non-members. 450 U.S. at 564.

II. DE FACTO DIVESTITURE OF TRIBAL SOVEREIGNTY TO REGULATE NON-MEMBER CONDUCT ON FEE LAND PRESUMPTIVELY OCCURS WHEN RESERVATION LAND LOSES ITS INDIAN CHARACTER.

The Ninth Circuit's apparent suggestion that the more checkerboard a reservation, the more reason exists to grant a tribe authority to zone non-Indian fee land to assure "comprehensive planning [of tribal land], so fundamental to a zoning scheme"[16] is both contrary to logic and legally unsupportable. The broad and unacceptable ramifications of this argument are most evident when examined in the context of checkerboard reservation land that has lost its Indian character, such as the land set

[16] Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529, 535 (9th Cir. 1987).

apart for the Oneidas in the Treaty of 1838.

A. The Ninth Circuit's Analysis Produces Illogical Results.

The Ninth Circuit's reasoning leads to the illogical result that the presence of an increasing number of non-members (and thus a more checkerboard reservation) increases the likelihood that a tribe will regulate non-member land. The practical effect of the implementation of this reasoning on the non-Indian community would surely unsettle expectations built on years of Indian acquiescence to local government regulation. For example, after the allotment process the Oneidas participated in and benefited from the services and improvements of the state, county and municipal governments. As early as 1893, the Oneidas exercised their right to vote in local elections. In addition, the Oneidas requested, were employed during,

and benefited from the construction of roads, bridges, schools and other public works. Similarly, the Oneidas voluntarily subjected themselves to the jurisdiction of local law enforcement authorities and state and local courts for resolution of civil and criminal disputes.

Thus, with the full acquiescence of the Oneidas, state and local authorities exercised civil, criminal and regulatory jurisdiction over the land set apart pursuant to the 1838 Treaty. During this period, the United States did not recognize or treat the 1838 Treaty land as an Indian reservation or as otherwise exempt from state or local jurisdiction. In fact, on two occasions the District Court for the Eastern District of Wisconsin held that the original Oneida reservation had been disestablished or discontinued as a result of the allotment process. United States v. Hall, 171 F. 214 (E.D. Wis. 1909); Stevens

v. County of Brown, No. 3807 (E.D. Wis. Nov. 3, 1933).

Moreover, persons other than Oneidas now occupy the vast majority of the treaty land and that land has long since lost its Indian character. Instead, the land is now occupied by the homes, businesses, churches, and institutions of approximately 11,600 people who are not Oneidas.[17] The long-standing assumption of jurisdiction by state and local governments with the acknowledgment and acquiescence of the Oneidas and the United States has created justifiable expectations that that land will continue to be subject to state and local jurisdiction.

Logic would suggest that, on the facts recited above, an Indian group claiming the right to regulate non-member conduct on fee land would be required to surmount almost

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[17] See supra note 9.

insuperable presumptions. Instead, the Ninth Circuit suggests a presumption of tribal authority to regulate non-member conduct on fee land within checkerboard reservations. Paradoxically, the more a reservation loses its Indian character as a result of non-member settlement, the easier it becomes for a tribe to assert a right to regulate non-member land to achieve "comprehensive" land use planning.[18]

[18]Not only has the Ninth Circuit erred in reversing the presumption that a tribe has no inherent authority to regulate non-member fee land, but it has erred by creating an undefined "balance of interests" test to determine when the power it presumes to exist should be exercised. If this Court accepts the use of such a test, there must be specific limits to its application. For example, it would be inconsistent with the dependent sovereign status of an Indian tribe to permit it to extend its authority beyond what is essential for control of internal tribal matters. United States v. Wheeler, 435 U.S. 313 (1978). Accordingly, a court should balance only those tribal interests that are uniquely Indian interests against the conflicting interests of a local government.

B. The Ninth Circuit's Opinion Is Legally Unsupportable Because It Conflicts With This Court's Decision In Solem.

The scope of an Indian tribe's regulatory power over non-member fee land cannot be assessed without a corresponding inquiry into the current status of those formerly tribal lands. As stated by this Court in Montana:

> There is simply no suggestion in the legislative history [of the General Allotment Act] that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

450 U.S. 544, 559 (quoting United States v. Montana, 604 F.2d 1162 (9th Cir. 1979)).

The logic of this reasoning, missing from the Ninth Circuit's opinion, is supported by this Court's analysis in Solem v. Bartlett, 465 U.S. 463 (1984). In Solem, the Court stated that explicit language of cession or termination is not required for a finding of disestablishment. 465 U.S. at 471. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 588 n.4 (1977). Instead, the legislative history of the allotment process and surrounding circumstances can sufficiently evidence congressional intent to disestablish. See id. Specifically, this Court stated that:

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the open portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment, may have occurred. (Citations omitted.) In addition to

> the obvious practical advantages of acquiescing to de facto diminishment, we look to the subsequent demographic history of open lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.

Solem, 465 U.S. at 471.[19]

This Court's recognition in Solem of the wisdom of looking to the subsequent demographic history of opened lands ought to apply with equal force to any determination of whether a tribe has been divested of its sovereignty to regulate non-member conduct on fee land. As the Court reasoned in Solem:

> When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land

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[19] See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), in which this Court held that the circumstances surrounding the passage of the three Rosebud Acts unequivocally demonstrated that Congress intended each act to diminish the Rosebud Reservation.

> remains Indian country seriously burdens the administration of state and local governments.

465 U.S. at 472 n.12.

The Ninth Circuit erred by not scrutinizing the demographic history of the alienated lands, in particular the open area of the Yakima Indian Reservation. Adherence to Montana would have precluded that error.

CONCLUSION

For the reasons set forth above, amici curiae The City of Green Bay, Wisconsin, the towns of Hobart and Oneida, Wisconsin and the Wisconsin counties of Brown and Outagamie respectfully submit that the

judgment of the Court of Appeals for the Ninth Circuit must be reversed.

Respectfully submitted,

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---

BRIEF OF *AMICI CURIAE* STANDING ROCK SIOUX TRIBE AND ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION IN SUPPORT OF RESPONDENT

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22 pp

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. TRIBES RETAIN CIVIL JURISDICTION OVER ALL LANDS ON THEIR RESERVATIONS WHERE TRIBAL INTERESTS ARE AFFECTED	4
A. The Territorial Component of Tribal Sovereignty is Firmly Established by The Rulings of This Court	4
B. *Montana v. United States* Supports Tribal Zoning Authority	7
C. The Courts of Appeals Have Properly Recognized The Need for Tribal Zoning of Reservation Fee Lands	9
II. CONGRESSIONAL POLICY—AS DEMONSTRATED BY THE RECENT AMENDMENTS TO THE INDIAN SELF-DETERMINATION ACT—SUPPORTS TRIBAL ZONING AUTHORITY	11
III. THE INDIAN REORGANIZATION ACT OF 1934, CONTRARY TO THE POSITION OF THE *STATE AMICI*, RECOGNIZED BROAD INHERENT TRIBAL GOVERNMENTAL AUTHORITY INCLUDING AUTHORITY OVER NON-INDIANS ON INDIAN RESERVATIONS	14
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Buster v. Wright, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) 6, 16
Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), *cert. denied* 459 U.S. 967 (1982) 9
Citizens Band of Potawatomi v. United States, 14 Ind. Cl. Comm. 570 (1964) 7
Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), *cert. denied* 459 U.S. 977 (1982) 10
Fisher v. District Court, 424 U.S. 382 (1976) 15
Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 6, 7, 11, 15
Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) 15
Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982) 3, 9
Lummi Indian Tribe v. Hallauer, 9 Indian Law Reporter 3025 (W.D. Wash. 1982) 6
Mattz v. Arnett, 412 U.S. 481 (1973) 5
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 5, 6
Montana v. United States, 450 U.S. 544 (1980) ..... *passim*
Morris v. Hitchcock, 194 U.S. 384 (1904) 16
Morton v. Mancari, 417 U.S. 535 (1974) 15
National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985) 5, 6
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 6, 8, 11
Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978) 5
Sac and Fox Tribe v. United States, 18 Ind. Cl. Comm. 558 (1967) 7
Talton v. Mayes, 163 U.S. 376 (1896) 16
United States v. Celestine, 215 U.S. 278 (1909) 5
United States v. Mazurie, 419 U.S. 544 (1975) ..... *passim*
United States v. Wheeler, 435 U.S. 313 (1978) 5, 15

TABLE OF AUTHORITIES—Continued

Page

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 5, 6, 8, 15
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 5, 11, 15
Williams v. Lee, 358 U.S. 217 (1959) 7, 15

Statutes and Treaties:

18 U.S.C. § 1151 7
Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.* ..... *passim*
Indian Self Determination Act, 25 U.S.C. § 450 *et seq.* ..... *passim*
Indian Self Determination Amendments of 1987 Public Law 100-472, 102 Stat. 225 12
25 U.S.C. § 476 ..... 16, 20
25 U.S.C. § 478 20
Clean Water Act, 33 U.S.C. § 1377 14
Safe Drinking Water Act, 42 U.S.C. § 300j-11 14
Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9626 14

Congressional Materials:

Hearing on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) ..... *passim*
Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) ..... *passim*
S. Rep. No. 274, 100th Cong., 1st Sess. (1988) 13-14
H.R. Rep. No. 2049, 73d Cong., 2d Sess. (1934) 20
78 Cong. Rec. 7959 (1934) 18
78 Cong. Rec. 11124 (1934) 22
78 Cong. Rec. 11729 (1934) 21
78 Cong. Rec. 11731 (1934) 22
78 Cong. Rec. 11732 (1934) 19, 21, 22
78 Cong. Rec. 11734 (1934) 22
78 Cong. Rec. 11736 (1934) 22
78 Cong. Rec. 11737 (1934) 22
78 Cong. Rec. 11739 (1934) 22

TABLE OF AUTHORITIES—Continued

	Page
78 Cong. Rec. 11743 (1934)	19
78 Cong. Rec. 12164 (1934)	19
Miscellaneous:	
Cohen's *Handbook of Federal Indian Law* (1982 Edition)	7
Tribal Self-Government and The Indian Reorganization Act of 1934, 70 Mich. L. Rev. 955 (1972)	17, 22
The Powers of Indian Tribes, 55 I.D. 14 (1934)	6, 15

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BRIEF OF *AMICI CURIAE* STANDING ROCK SIOUX TRIBE AND ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the Standing Rock Sioux Tribe are both federally recognized Indian tribes. Both the Fort Peck Reservation (in Montana) and the Standing Rock Reservation (in North and South Dakota) contain a mixture of trust lands and fee lands. The ability to zone Reservation fee lands to protect tribal communities from harmful development is crucial to maintaining the tribal homeland for the future.

The Tribes are also concerned with the wholesale attack on tribal jurisdiction made in this case by the states in which they live. This appears to be an attempt to remove from the Reservations all lands owned by non-Indians, further reducing the homeland guaranteed the Tribes by treaty.

The *amici* Tribes urge this Court to uphold the exclusive zoning jurisdiction of the Yakima Tribe over both the opened and closed portions of its reservation.

All parties have consented to the filing of this brief *amicus curiae*, and those consents have been lodged with the Clerk.

SUMMARY OF ARGUMENT

(I) This case involves the authority of tribes to zone reservation fee lands, where conduct on those lands affects tribal interests. The petitioners and their *amici* argue that a tribe has no jurisdiction to zone fee land on its reservation—that a tribe's powers do not extend to fee lands. This is contrary to this Court's numerous decisions upholding the territorial component of a tribe's jurisdiction, *e.g.*, *United States v. Mazurie*, 419 U.S. 544 (1975).

In *Montana v. United States*, 450 U.S. 544 (1980), the Court expressly recognized a tribe's authority over conduct on fee lands which "threatens or has some direct

effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Id.* at 566. Zoning, where the land of the tribe or its members is threatened or affected by the use of fee land, is precisely authority over such conduct.

Both the Ninth and Tenth Circuits, in which large numbers of tribes are located, have upheld tribal zoning authority. In doing so they have been sensitive to the rulings of this Court and to the local situation. They have understood that non-Indian communities have little interest in protecting reservation lands, and that without the power to zone fee lands on their reservations, tribes would be without any effective remedy to preserve their reservation as a homeland. *See Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982).

(II) Congressional policy, including this year's amendments to the Indian Self-Determination Act, endorses the capabilities of tribal governments and recognizes the necessity of tribal zoning and land use planning to facilitate economic development. The denigration of tribal government by several *amici* supporting petitioners here is not only inappropriate but is inconsistent with Congress' findings and the decisions of this Court.

(III) The *State Amici* seek to reconstrue the legislative history of the Indian Reorganization Act to have the Court view it as insignificant in the strengthening of tribal government and the preservation of tribal governmental authority. Their view is inconsistent with the numerous decisions of this Court construing the Act, with the language of the Act, and with the Act's legislative history. It is true that the original bill would have delegated enumerated powers to the Tribes to the extent determined by the Secretary of the Interior. Those provisions were stricken and in their place was put the current Section 16 which instead preserves *all* existing tribal powers and allowed others to be added. The initial

objections to the Act—which *amici* rely upon—were overcome after President Roosevelt's intervention, and the Act as passed strongly strengthened Indian government and repudiated the policies of allotment and assimilation.

ARGUMENT

I. TRIBES RETAIN CIVIL JURISDICTION OVER ALL LANDS ON THEIR RESERVATIONS WHERE TRIBAL INTERESTS ARE AFFECTED

A. *The Territorial Component of Tribal Sovereignty is Firmly Established by the Rulings of This Court.*

Much of the argument by petitioners and their supporting *amici* consists of their reading of certain language from *Montana v. United States*, 450 U.S. 544 (1980). But the decisions of this Court both before and after *Montana*, and *Montana* itself, recognize tribal civil jurisdiction over non-Indian activities on reservation lands—whether trust or fee—which significantly affect tribal interests.

In *United States v. Mazurie*, 419 U.S. 544 (1975), a unanimous Court upheld tribal authority to regulate the sale of liquor *by non-Indians on fee lands* on an Indian reservation. *Mazurie* arose on the portion of the Wind River Reservation which was open to non-Indian settlers and checkerboarded, much like the open area at Yakima. The Tenth Circuit had ruled that Congress could not delegate to the Tribes licensing authority over liquor sales on fee lands, because the Tribes were mere landowners, lacking authority over fee lands. In wholly rejecting this argument Justice Rehnquist wrote:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.

Id. at 557 (citations omitted).

The Court has reaffirmed the territoriality of tribal jurisdiction in numerous decisions. As the Court stated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980), "there is a significant geographical component to tribal sovereignty." [1]

In a broader sense, the Tribes' territorial powers in civil matters are part of the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).[2] These retained powers have been consistently upheld as

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[1] The lands at issue are *on the Reservation.* No claim is made—nor could one be—that these lands are off the Reservation. Nevertheless, petitioners and their supporting *amici* suggest that the Court treat these lands as if they were no longer within the Reservation or subject to any tribal jurisdiction. Their argument—in effect that fee lands are per se not to be treated as reservation lands—has been rejected continuously by the Court for over 75 years. *See United States v. Celestine*, 215 U.S. 278, 285 (1909). While under the allotment policy, now repudiated, the United States allowed non-Indians to purchase land within reservations, unless Congress unequivocally provided otherwise, those purchased lands remain within the reservation. *E.g., Mattz v. Arnett*, 412 U.S. 481, 498-99 (1973).

[2] In addition to express congressional limitations on tribal authority, tribes have been implicitly divested of their criminal jurisdiction over non-Indians by virtue of their status as domestic dependent sovereigns. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). *Oliphant* relied on the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians . . . ." 435 U.S. at 206. With respect to civil jurisdiction, the Court has consistently found the common understanding of the three branches of Government to be precisely the opposite. *See National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 854-55 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-147 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980).

to civil jurisdiction over non-Indian conduct on the reservation, *e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (hunting and fishing); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (severance taxation); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (sales taxation). This has been so where the conduct was on fee land. *United States v. Mazurie*, 419 U.S. 544 (1975) (individually owned fee land); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) (fee land owned by school district). As this Court recently stated, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (citations omitted):

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.[3]

Nor is this anything new. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 140 (quoting from an *1879* Senate Report describing broad civil powers of Indian tribes); *Buster v. Wright*, 135 Fed. 497 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) (upholding tribal authority to tax non-Indians on reservation fee lands); *The Powers of Indian Tribes*, 55 I.D. 14, 55 (1934) (defining the broad civil authority of tribes preserved by the Indian Reorganization Act.)[4]

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[3] The ruling in *LaPlante* did not turn on whether the underlying incident involved trust or fee lands. *LaPlante* involved an injury in an automobile accident allegedly occurring on a federal highway on the reservation. The District Court made no findings—and neither the Ninth Circuit nor this Court commented on—the fee or trust status of the accident site. The lower court opinions are unpublished but were printed in the appendix to the petition for writ of certiorari in *Iowa Mutual Ins. Co. v. LaPlante*.

[4] Thus, it has long been clear that, for jurisdictional purposes, people living on fee lands within Indian reservations are not in the same situation as people living off reservations. They cannot sell liquor on their land without the consent of the tribe. *United States v. Mazurie*, 419 U.S. 544 (1975). Crimes committed on their land, if they involve an Indian, may be handled in federal courts. 18 U.S.C. 1151-1152; *see* Cohen's *Handbook of Federal Indian Law* (1982 ed.) ("Cohen"), pp. 286-287. Civil suits involving events that occur on such lands may be tried in Tribal Courts. *Williams v. Lee*, 358 U.S. 217 (1959) (non-Indian as plaintiff); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (non-Indian as defendant).

On the other side of the ledger, the non-Indians who purchased reservation lands obtained considerable benefits in this arrangement. They were able to obtain land free or well below market price. *E.g.*, *Citizens Band of Potawatomi v. United States*, 14 Ind. Cl. Comm. 570, 580 (1964) (Docket 96); *Sac and Fox Tribe v. United States*, 18 Ind. Cl. Comm. 558, 616, 631 (1967) (Docket 219). They were and are able to use irrigation systems built for the Indians. *See* Cohen, pp. 728-732. They were often able to obtain permits to use large areas of federal land or lease Indian lands at concessionary rates, thus expanding small farms or ranches into effectively much larger ones.

B. Montana v. United States *Supports Tribal Zoning Authority.*

Montana must be read within the context of this Court's other rulings, both before and after it. Viewed in this manner, *Montana* teaches that Indian tribes have civil jurisdiction over non-Indian activities on reservation fee lands where the non-Indian activities threaten or affect Indian governmental, property or other interests. Where Indian interests are not implicated—as the Court found to be the case in *Montana*—tribes do not have civil jurisdiction over non-Indians on fee lands. This Court and the lower courts have consistently read *Montana* this way. No court has ruled—as petitioners invite here—that *Montana* was the death knell of tribal civil jurisdiction over non-Indians.

In *Montana*, the Crow Tribe sought to prohibit non-Indian hunting and fishing on certain fee lands. The Court stated that "[t]he complaint in this case did not

allege that non-Indian hunting and fishing on reservation lands has impaired" the Tribes' treaty right to hunt and fish. *Montana*, 450 U.S. at 558 n.6.[5] In these circumstances—where there was *not even an allegation* that the non-Indians were in any measure affecting any Indian interests—the Court held the Tribe lacked authority to bar non-Indians from hunting and fishing on fee lands.

At the same time, the Court in *Montana* reaffirmed that tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565. This includes civil jurisdiction over nonmembers who enter "contracts, leases, or other arrangements" with the Tribe or Indians. *Id.* In addition, tribes retain civil authority over non-Indian conduct on reservation fee lands which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Id.* at 566.

Montana, then, means that where a significant tribal interest is threatened, or directly affected, the tribe may regulate the on-reservation conduct of non-Indians, on trust lands or fee. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331, n.112 (1983); *Washington v. Confederated Tribes*, 447 U.S. 134, 152 ("tribes possess a broad measure of civil jurisdiction over the activities of non Indians on Indian Reservation lands in which the tribes have a significant interest."). Indeed, this Court has cited *Montana* for the proposition that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

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[5] The complaint moreover "did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe." *Id.* at 566.

C. *The Courts of Appeals Have Properly Recognized The Need for Tribal Zoning of Reservation Fee Lands.*

Tribal regulatory jurisdiction over fee land on a tribe's reservation is essential to protect the use of the tribal land. Only the Tribe has an interest in protecting the reservation as a homeland for its people. To the non-Indian governments, the reservation is a place of less than normal concern, in part because of the sweep of federal jurisdiction. To the tribe it is everything.

The Courts of Appeals have consistently applied *Montana* to preserve this much-needed aspect of tribal civil jurisdiction over reservation fee lands. For example, in *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982), the Tenth Circuit upheld the application of a tribal zoning ordinance to fee lands on the checkerboarded Wind River Reservation. *While the county had land use regulations*, those regulations did not stop a non-Indian from subdividing land into an 132 lot trailer park in the midst of a rural Indian community. The county's interest apparently was to allow "development"—even this haphazard development, which was proposed without adequate provision for fire, garbage and other necessary services. Only the Tribes had an interest in preserving the integrity of the rural Indian community.

Without the power to zone, tribes would be without any effective remedy to keep non-Indians from turning their reservations into places for cheap subdivisions, dumps and land speculation. As the Tenth Circuit recognized in *Knight*, under this Court's rulings, including *Montana*, tribal governments are not powerless to prevent such a result. *See also Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982), *cert. denied* 459 U.S. 967 (1982) (in which the Ninth Circuit upheld a tribe's authority to regulate a grocery store on reservation fee lands which

was a fire hazard and threatened rodent contamination of food).[6]

The Ninth Circuit in this case applied *Montana* consistently with other decisions of this Court and the courts of appeals.[7] The Yakima Nation enacted its zoning ordinance in 1970 and has ruled on hundreds of land use applications. The Court of Appeals upheld tribal authority to zone fee lands in both the closed area (comprised of largely undeveloped trust lands) and the open area (a checkerboard of trust and fee lands) of the reservation. The Court stated that in

> enacting zoning ordinance[s], a tribe attempts to protect against the damage caused by uncontrolled development, which can affect all of the residents and land of the reservation. Tribal zoning is particularly important because of the unique relationship of Indians to their lands. 828 F.2d at 534.

With respect to both portions of the reservation, the Court noted the Tribe had significant interests which could be impaired by the proposed development—including harm to lands through erosion, harm to the tribal way of life through increased population density, harm to tribal governmental interests by requiring additional police or fire services, as well as harm to tribal religious interests in sacred burial grounds near the planned development. *Id.* at 535 and 536 n.5. These tribal interests were found sufficient to sustain tribal zoning.

[6] *See also Lummi Indian Tribe v. Hallauer*, 9 Indian Law Reporter 3025 (W.D. Wash. 1982), in which the district court upheld the Lummi requirement that non-Indian owners of fee land, as well as Indians, use the new tribal sewer disposal system; *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied* 459 U.S. 977 (1982) upholding, *inter alia*, the Flathead Tribes' regulation of piers and sewer discharge into Flathead lake from fee land as well as trust.

[7] These rulings also show that tribes have exercised their powers with restraint. Both the Yakima ordinance here, and the Shoshone and Arapahoe ordinance in *Knight*, did not seek to zone non-Indian communities on the reservation.

This case is factually unlike *Montana*—in which no impact on tribal interests was alleged. Rather, this is a case in which core tribal interests—the Tribe's ability to preserve its resources and the character of its reservation homeland—are at stake. The court below, following the teachings of this Court, properly held that the Tribe retains the power to zone as necessary to protect those interests.[8]

II. CONGRESSIONAL POLICY—AS DEMONSTRATED BY THE RECENT AMENDMENTS TO THE INDIAN SELF-DETERMINATION ACT—SUPPORTS TRIBAL ZONING AUTHORITY

South Dakota (Br. pp. 2-12) and certain other *amici* use their briefs to denigrate tribal government. Congress does not share their views.

This Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). Federal Indian policy "includes Congress' overriding goal of encouraging 'tribal self sufficiency and economic development' . . . ." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Tribal authority over on-reservation conduct must be "construed generously in order to comport . . . with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

Action at the close of the 100th Congress confirms both that federal policy recognizes the capabilities of tribal

[8] With respect to the open portion of the Reservation, the Ninth Circuit remanded for a determination of whether off-reservation impacts could justify county zoning.

government and supports tribal zoning and land use planning. Within the past month, one of the cornerstones of federal Indian policy, the Indian Self-Determination Act, 25 U.S.C. 450 *et seq.*, has been amended to expand governmental opportunities for tribes and to enhance reservation economic development. Indian Self-Determination Amendments of 1987, Pub. L. 100-472, 102 Stat. 225 (October 5, 1988). The original Self-Determination Act —enacted in 1975—was designed to allow tribes to assume increased responsibility for federal Indian programs. The amendments, among other things, expand the scope of federal programs which tribes may administer (Section 201(a)), clarify that funds available for tribally-run programs are not to be arbitrarily diminished (Section 205), remove indirect cost penalties (Section 205), and broaden the availability of technical assistance to tribes (Section 202).

In seeking to further the tribal self-determination policy, Congress noted the progress tribes have made over the past decade, and expressed confidence in tribal governmental capabilities. As the Senate Report on the bill which became the Self-Determination Amendments states:

> *Indian tribal governments have developed rapidly since passage of the Indian Self-Determination Act.* In addition to operating health services, human services, and basic governmental services such as law enforcement, water systems and community fire protection, *tribes have developed the expertise to manage natural resources and to engage in sophisticated economic and community development.* All of these achievements have taken place during a time when tribes have also developed sophisticated systems to manage and account for financial, personnel and physical resources. Most Indian communities share with rural non-Indian communities problems of inadequate infrastructure and lack of access to managerial talent. Nevertheless, *compared to state, county and municipal governments of similar demographic and geographic characteristics, the level of development attained by tribal governments over the past twelve years is remarkable.* This progress is directly attributable to the success of the federal policy of Indian self-determination.

S. Rep. No. 274, 100th Cong., 1st Sess., p. 4 (Emphasis added).

The Act also reflects Congress' determination that strong tribal governmental authority and reservation economic development are related goals which must advance together.

> The obvious conclusion is the same for Indian and non-Indian rural communities: the development of local government services, the provision of supportive human services, and local planning are essential to successful economic development. The Indian Self-Determination Act has made these conditions possible on many Indian reservations. *Id.* at 5.[9]

More specifically, Congress recognized that tribal self-determination contracts are appropriately used to produce tribal land use and zoning ordinances, which in turn promote tribal economic development efforts.

> Tribal self-determination contracts to conduct comprehensive planning, *land use studies* and natural resource inventories have been essential to the success of Indian economic development efforts. *Id.* at 4-5. (Emphasis added.)

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[9] This is also reflected in the Act's declaration of policy, which was amended to include the following language (Section 102):

> In accordance with this policy, *the United States is committed to supporting and assisting Indian tribes in* the development of strong and stable tribal governments, capable of administering quality programs *and developing the economies of their respective communities.* (Emphasis added.)

Likewise, in discussing the provision authorizing expanded technical assistance, the Senate Report states:

> Not only will such interaction [between Tribes and entities other than the federal government] lead to improved program planning, it could also lead to improved intergovernmental cooperation when tribes obtain technical assistance from local government sources in such areas as *zoning ordinances*, environmental quality planning, and other technical areas. (Emphasis added.) *Id.* at 28.[10]

In short, Congressional policy of promoting tribal government as a means toward Reservation economic development has recently been reaffirmed. In specifically addressing tribal land use planning and zoning, the Senate Committee which reported the measure indicated that these are important tools for Tribes in achieving the congressionally sanctioned goal of improving their economic status. Thus congressional policy would be furthered by upholding tribal zoning authority in this case. In the end, Congress' expression of Federal Indian policy, not certain *amici's* attempts to undermine that policy, must control.

III. THE INDIAN REORGANIZATION ACT OF 1934, CONTRARY TO THE POSITION OF THE *STATE AMICI*, RECOGNIZED BROAD INHERENT TRIBAL GOVERNMENTAL AUTHORITY INCLUDING AUTHORITY OVER NON-INDIANS ON INDIAN RESERVATIONS

This Court often has reviewed the Indian Reorganization Act (IRA), ruling time and again that the IRA confirmed broad tribal governmental powers, based on

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[10] Note that this language treats tribal zoning in the same manner as environmental quality planning, which tribes are authorized to regulate on all reservation lands, both trust and fee. Clean Water Act, 33 U.S.C. § 1377; Safe Drinking Water Act, 42 U.S.C. § 300j-11; Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. § 9626 *et seq.*

inherent tribal authority.[11] *State Amici*[12] nevertheless contend (Br., III) that the Indian Reorganization Act of 1934 somehow limited tribal governmental powers, particularly over non-Indians. This is clearly not so.

It is true, as *State Amici* note (Br., p. 10), that the final Act was a very substantial rewrite of the bill originally proposed by the Interior Department. *State Amici* speculate from some comments during the hearings on the original bill that the purpose of this revision was to limit tribal powers over non-Indian residents of reserva-

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[11] *E.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (The "Federal Government's longstanding policy of encouraging tribal self-government . . . ." is embodied in the IRA); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 199 (1985) ("The 73d Congress, in passing the IRA to advance tribal self-government, see *Williams v. Lee*, 358 U.S. 217, 220 (1959), did nothing to limit the established, preexisting power of the Navajo to levy taxes"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (IRA among "a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development."); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 168 (1980) (The "strong and oft-cited policy of encouraging tribal self-government" and the "complementary interest in stimulating Indian economic and commercial development", "[b]both found expression in the Indian Reorganization Act . . . ."") (citations omitted); *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (IRA "recognized that Indian tribes already had such power [the power to try Indian offenders] under 'existing law.' *See* Powers of Indian Tribes, 55 I.D. 14 (1934)"); *Fisher v. District Court*, 424 U.S. 382, 387 (1976) (IRA is "a statute specifically intended to encourage Indian tribes to revitalize their self-government."); *Morton v. Mancari*, 417 U.S. 535, 542-43 (1974) ("The overriding purpose of that particular Act [IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically. . . . The solution ultimately adopted was to strengthen tribal government . . . .").

[12] Ten states (*Arizona, et al.*) have jointly filed an *amicus* brief in this case. We refer to these as the "*State Amici.*"

tions. This conjecture is contrary to both the language and legislative history of the Act.[13]

The key language of the Act concerning tribal government authority, as *State amici* concede (Br., p. 16), is in Section 16, 25 U.S.C. § 476. That section in pertinent part, reads:

> *In addition to all powers vested in any Indian tribe or tribal council by existing law,* the constitution adopted by said tribe shall *also* vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. (Emphasis added.)

"Existing law" in 1934 confirmed tribal powers to tax and civilly regulate activities by non-Indians. This Court had expressly so held in *Morris v. Hitchcock*, 194 U.S. 384 (1904). And this tribal governmental authority over non-Indian activities had been held to extend to lands owned by non-Indians in fee within a reservation. *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). In 1934, it was also clear that tribes possessed these governmental powers as part of their inherent sovereignty, and not as powers granted or delegated to them by the United States. This Court had so held in *Talton v. Mayes*, 163 U.S. 376 (1896), dealing with the authority of the Cherokee tribal court.

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[13] Throughout this discussion, references to "Senate Hearings" are to Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d sess. (1934), and references to "House Hearings" are to Hearing on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d sess. (1934).

The Interior Department draft bill introduced in February 1934 would have entirely *changed* the status of tribes: by making tribes federal municipal corporations, instrumentalities of the United States—rather than inherent sovereign entities. *See, e.g., Note, Tribal Self-Government and The Indian Reorganization Act of 1934*, 70 Mich. L.Rev. 955, 962 (1972) (hereafter "Michigan Note").

BIA Commissioner Collier stated at the opening of the House hearings, "the bill curbs Federal absolutism and provides Indian Home Rule *under Federal guidance.*" House Hearings, p. 18 (emphasis added). Throughout their extensive consideration of the bill from February through May, 1934, members of both the Senate and House Committee complained that Interior's bill contained so much "Federal guidance" that it retained the "Federal absolutism" that the Commissioner stated he wished to curb. Title I of the Interior bill as originally introduced, would have authorized the Secretary of the Interior to issue a charter to any Indian tribe "*granting*" that tribe "any or all . . . powers of government" enumerated in the bill as seen fit by the Secretary. S. 2755 and H.R. 7902, 73d Cong., 2d Sess., Title I, §§ 2, 4.[14] The Secretary would have had discretion over which powers to grant tribes, and which to withhold.[15] Moreover, all tribes would have been subject to the Act, whether they wished to be covered or not.

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[14] The original bill is App. A to the *State Amici*'s brief.

[15] BIA Commissioner Collier repeatedly and unsuccessfully urged that "this discretion is only a tithe of the existing discretion which the bill curbs" and that "the grant of discretion was necessary because in no other way can the variety of conditions be met. Flexibility is necessary." *E.g.*, House Hearings, p. 47, Commissioner's statement (starting the second day of hearings). As their subsequent statements and actions show, congressional leaders were unconvinced and substantially changed the bill, among other reasons, to eliminate this federal control.

The bill also contemplated establishing a new federal Court of Indian Affairs under Title IV. This Court would have had jurisdiction "[o]f all cases at law or in equity arising out of commerce with any Indian tribe . . . or members thereof, wherein a real party in interest is not a member of such tribe . . . " as well as certain other cases including those to which any tribe is a party. Title IV, § 3(3). This Court of Indian Affairs could order the removal to itself of *any* pending tribal court cases, Title IV, § 5, and would hear appeals of all tribal court decisions, Title IV, § 6.

These and other features of the bill—particularly those features that represented compulsory Interior Department and federal control over tribes—were strongly resisted by members of both the Senate and House Committees on Indian Affairs, and by some tribes. Indeed, it seemed likely by late April that the entire bill would be rejected.[16]

On April 28, however, President Roosevelt intervened by letter to both Committee Chairman, *see* 78 Cong. Rec. 7959 (May 1, 1934); House Hearings, p. 233; Senate Hearings, pp. 145-46. The President's advocacy as to the importance of the bill, and his power and prestige at this

[16] This is particularly apparent from a colloquy at the Senate Committee on Indian Affairs hearing that opened on April 30 between the principal participants in the Senate hearings—Committee Chairman Wheeler of Montana, Senator Ashurst of Arizona and Senator Thomas of Oklahoma.

Senator Ashurst stated that "[i]t is well known I am opposed to the bill . . . —the most important Indian bill ever brought before Congress during my service." He moved that a subcommittee be appointed to review the bill. Senate Hearings, pp. 143-144.

A colloquy then ensued where each of the three Senators expressed doubts about the bill. (*Id.* at pp. 114-145.) This colloquy is quoted in part by *State Amici* in their brief, p. 12, n.8. As noted, *infra*, however, President Roosevelt's intervention changed this viewpoint and convinced the opponents to support and enact the final bill, as modified.

early point in the New Deal, apparently convinced both Committees to support the bill,[17] but only after working with the Administration in extensively rewriting it, so much so that—as Congressman Howard, Chairman of the House Indian Affairs Committee, told the House—"the original bill would not recognize this as its own child." 78 Cong. Rec. 12164.

[17] The context of the Senate Committee's consideration of the bill was dramtically changed, when, during the colloquy referred to in note 16 and relied upon by *State Amici*, Chairman Wheeler informed his colleagues:

> I received a letter from the President Saturday in which he gave whole-hearted support to the bill and said that he was very anxious that the bill should be passed at this session of Congress. I am anxious not to delay the consideration of it but to try and get something worked out that can be worked out that might be satisfactory to the Senator from Arizona and to the different Senators. I think something can be worked out of this bill. In its present form I think it has many objectionable features, but my idea is that we can work out something . . . ."

Senate Hearings at 145-146.

A subcommittee proved unnecessary, because on May 17, Chairman Wheeler announced that, after he met with BIA Commissioner Collier, the Interior Department produced a new "bill, which eliminates, it seems to me, practically all of the matters that are in controversy . . . ." *Id.* at 237. The House Committee went into executive session beginning May 9, and evidently rewrote the bill between then and May 17, in conjunction with Commissioner Collier. House Hearings, pp. 497, 502-503. With some further technical modifications by the Senate Committee and on the Senate floor, this modified bill was enacted.

In addition to persuading Chairman Wheeler to develop a modified, compromise bill (discussed *supra*), President Roosevelt's personal intervention was also seen as critical to passage of the bill by several Congressmen. 78 Cong. Rec. 11732 (Rep. Howard); 11743 (Rep. Frear). House Committee Chairman Howard's disclosure of the same letter to his Committee on May 1 persuaded committee members that the President really did support the purposes of the bill, and had not earlier "given his endorsement in a haphazard way . . . wholly unaware of the real purport of the bill." House Hearings, p. 234.

Title IV, which provided a separate Court of Indian Affairs, was completely removed, leaving tribal courts free to operate without federal interference. As noted, instead of tribes being "granted" those governmental powers enumerated at great length in Title I at the sufferance of the Department, Section 16 of the final Act, 25 U.S.C. § 476, confirmed all powers held by tribes "under existing law." [18] And Section 18 of the bill, 25 U.S.C. § 478, gave tribes the option of voting to be excluded from the Act's provisions, which included adoption of a modern constitution.

The explanations given by the two Committee Chairmen—Senator Wheeler and Congressman Howard—and other committee members when they presented the revised bill on the floors of the two houses, confirm that the dominant purpose of the Committees' revisions was to free Indians from the heavy bureaucratic control of the Interior Department contained in the Department's original draft. Congressman Howard, for example, explained the situation as follows:

> . . . [I]n reality the Indians can only be described as Federal peons.
>
> Although many thousands of Indians are living in tribal status on the various reservations, their own native tribal institutions have very largely disintegrated or been openly suppressed, and the entire management of Indian affairs has been more and more concentrated in the hands of the Federal Indian Service. *The powers of this Bureau over the property, the persons, the daily lives and affairs of the Indians have in the past been almost unlimited. It has been an extraordinary example of political absolutism in the midst of a free democracy*—absolutism built up on the most rigid bureaucratic lines,

[18] This language was in both redrafts considered by the Committees after the President's intervention—Section 9 of the Senate bill and Section 17 of the House bill. It became Section 16 of the Act, 25 U.S.C. § 476. *See* H.R. Rep. No. 2049, 73d Cong., 2d Sess., (1934) p. 8 (Conference Report).

> irresponsible to the Indians and to the public; shackled by obsolete laws; resistant to change, reform, or progress; . . . .
>
> * * * *
>
> . . . It is perfectly clear that the Indian, in order to win a secure and self-respecting position in our American community, *must have not only economic security and the chance of self-support, but must also have constant practice in civic affairs and in the management of property and business.* The system of guardianship hither to in effect has deprived the Indian of this practice.

78 Cong. Rec. 11729 (Emphasis added).

Congressman Howard summarized "the ultimate goals of the policy embodied in this bill" as including:

> seek[ing] the functional and tribal organization of the Indians so as to make the Indians the principal agents in their own economic and racial salvation, and . . . progressively reduce and largely decentralize the powers of Federal Indian Service. In carrying out this program, the Indian Service will become the adviser of the Indians rather than their ruler . . . . [T]he new policy will constantly strengthen the Indians, rather than weakening them."

Id. at 11732.

Senator Wheeler explained the bill in similar fashion to the Senate. Senator King of Utah stated (evidently referring to the Interior Department's original draft):

> I have been told that this bill may perpetuate the Indian Bureau, and that the Indian Bureau has been very anxious for a measure of this character . . ."

Senator Wheeler responded:

> Let me say to the Senator there is not a provision in this bill which superimposes upon the Indians bureaucratic control from Washington. On the contrary, this bill proposes to give the Indians an opportunity to take over the control of their own resources

> and fit them as American citizens. The bill as it originally came from the Department had many objectionable features, which were eliminated from it.

Id. at 11124.

As noted, the "objectionable features" (*see State Amici* Br., p. 16) the Committees "eliminated" from the bill were mainly in Title I and Title IV. As finally presented, the rewritten bill, with deletion of the extensive federal control over tribal governments contained in the original bill, and tribal option as to whether to come under most provisions of the Act, was unanimously passed by the Senate, *Id.* at 11139—and unanimously supported by the House Committee on Indian Affairs. *Id.* at 11732. Even so, some members of the House opposed the final bill as retaining too much power in the Interior Department over tribal governmental decisions. *Id.* at 11734 (Rep. Beiter), 11736-37 (Rep. Carter).

The strengthening of tribal governmental authority and lessening of federal control in the final bill were seen by its congressional supporters as an important "reversal of established policy." *E.g.*, 78 Cong. Rec. 11743 (Rep. Frear).[19] As Congressman Howard said (characterizing the provision that became Section 16 of the Act): "[t]he psychological and moral effects of these provisions for Indian incorporation and home rule are bound to be far-reaching." *Id.* at 11731.

The complete legislative history of the Act, as well as its language, overwhelmingly reject *State Amici's* characterization of its purpose and support prior holdings of this Court. *State Amici* rely upon isolated, often out of context statements—usually made before President Roosevelt's personal intervention with the Committees changed the minds of key members.[20] The Indian Reor-

[19] As the Michigan Note concludes "every section [of the IRA] in some way affects tribal self-government." 70 Mich. at 964.

[20] For example, Senator Wheeler's statement (*State Amici* Br., p. 15) that "you are going entirely too far * * * in letting those

ganization Act changed its method—from delegations of enumerated authority to preservation of *all* existing authority—but kept its same purpose and effect as a dramatic strengthening of tribal governments and a reversal of earlier destructive policies.

CONCLUSION

The court below properly followed this Court's rulings. With regard to the closed portion of the Reservation, it upheld exclusive tribal zoning authority. As to the open portion, the court below upheld tribal power to zone fee lands, and remanded for a determination of whether *off-reservation* county interests could justify superimposing county zoning on the Tribe's regulatory scheme. The ruling of the court below should be affirmed.

Respectfully submitted,

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Dated: November 3, 1988

tribes set up rules and regulations," Senate Hearings, p. 199, was his reaction to Title IV's proposal to create a separate federal Court of Indian Affairs, and give that Court authority to remove cases concerning *off-reservation* transactions involving Indians *from state courts, see* Senate Hearings, p. 198. His comments on Indian government were to the concept of chartered communities. Similarly, Commissioner Collier, the chief Interior witness testifying in support of the bill, made the statement quoted by *amici* (*State Amici* Br., p. 16) that non-Indians would "kick like steers" if the Federal Court of Indian Affairs—which Collier supported *as did Congressman DePriest, with whom he was talking*—were enacted. The special federal court, of course, was not enacted, and Title I was changed to support inherent tribal governmental authority rather than making tribes creatures of authority delegated by the Secretary of the Interior.

(18) (19) (18)

Nos. 87-1622, 87-1697 and 87-1711

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,

Respondents.

STANLEY WILKINSON,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

COUNTY OF YAKIMA, *et al.*,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICUS CURIAE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION IN SUPPORT OF RESPONDENT

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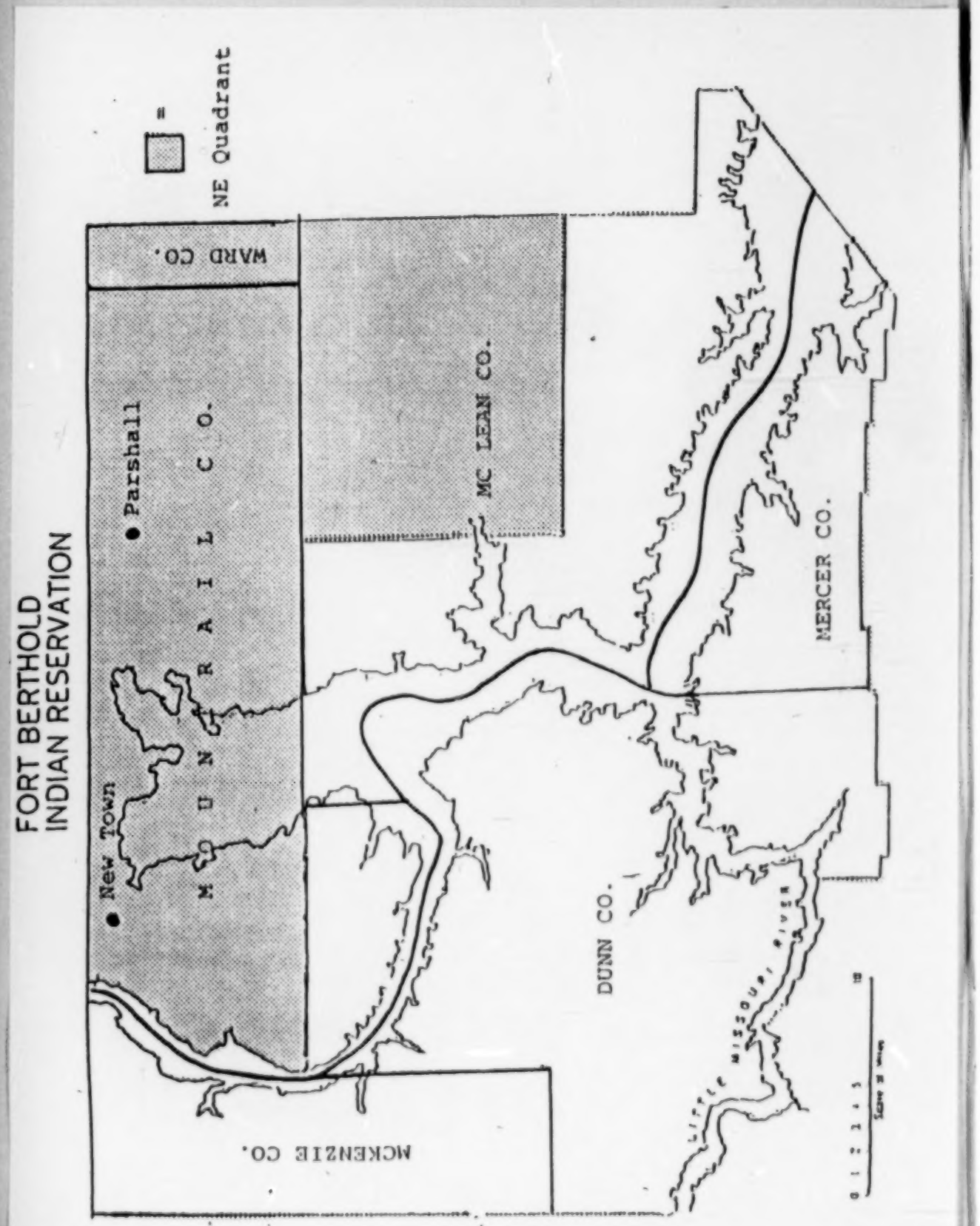


TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	2
ARGUMENT	4
I. UNIFIED ZONING REGULATION IS ESSENTIAL ON INDIAN RESERVATIONS	4
A. Facts Pertaining to the Fort Berthold Reservation	4
B. A Single Reservation Should be Governed By a Single Zoning Law	8
C. Single Reservations Are Already Governed By Single Tribal Environmental Laws	12

TABLE OF AUTHORITIES

Cases	Page
Blue Legs v. U.S. Environmental Protection Agency, 668 F. Supp. 1329 (D.S.D. 1987)	12
Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982)	12
Chase v. McMasters, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978)	5
City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972)	5
Governing Council of the Pinoleville Indian Community v. Mendocino County, 684 F. Supp. 1042 (N.D. Cal. 1988)	11
Knight v. Shoshone Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982)	9-10
Santa Rosa Band of Indians v. Kings Co., 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1976)	10
Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987)	11
Seymour v. Superintendent, 380 U.S. 359 (1962)	4
United States v. Montana, 450 U.S. 544 (1981)	8
Washington v. U.S. Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985)	12

Statutes, Treaties and Regulations	
7 U.S.C. § 136b	8, 13
25 U.S.C. § 476	4
30 U.S.C. § 1300	14
33 U.S.C. § 1377	13
42 U.S.C. § 300f	13
42 U.S.C. § 9601	13
Treaty of Fort Laramie, 11 Stat. 749 (1851)	4
Act of March 3, 1891, 26 Stat. 1032	4
Act of June 1, 1910, 36 Stat. 455	4
51 FR 22861 (1986)	8, 13

TABLE OF AUTHORITIES—Continued

Miscellaneous	Page
II Opinions of the Interior Solicitor 2009, M-36802 (1970)	4
133 Cong. Rec. H184 (1987)	13
Dunn County Zoning Ord.	5
McClean County Zoning Ord.	5, 6
Mercer County Zoning Ord.	5
Mountrail County Zoning Ord.	5, 6
Ward County Zoning Ord.	6
City of Parshall Zoning Ord.	6
City of New Town Zoning Ord.	6
Three Affiliated Tribes of Fort Berthold Tribal Land Use Plan and Code	6-7
EPA, Indian Policy Statement (Nov. 1984)	13

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICUS CURIAE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The amicus curiae, Three Affiliated Tribes of the Fort Berthold Reservation ("Tribe"), is a federally recognized tribe residing in North Dakota. The Tribe occupies a reservation that has a land base nearly identical to that of the Respondent Yakima Indian Nation. That is, the Fort Berthold Reservation consists of a "closed" area (a portion of the reservation that was never opened to non-Indian settlement), and an "open" area or a portion of the reservation that was opened to non-Indian settlement. The closed area is virtually entirely composed of Indian-owned trust land as is the southern third of the open area. The open area is mostly composed of fee patented land occupied by non-Indians, but even here some Indians own trust land, and the Tribe owns large deposits of subsurface coal. See map inside front cover.

Recently, the Tribe passed a zoning ordinance for the entire Reservation governing both closed and open areas. See below at 6. In addition, the Tribe, to the exclusion of the State of North Dakota, was recently delegated regulatory authority by the Environmental Protection Agency governing the application of pesticides on all lands, both Indian and non-Indian, within the Reservation boundaries. See below at 8.

The Tribe urges affirmance of the decision below. The Tribe has a strong interest in preserving its sovereign authority over its Reservation and its governmental control over the use of lands anywhere within the entire Reservation, an authority implicitly recognized by the county governments.[1]

---

[1] Four of the six counties in which the Reservation lies have expressly excluded the Reservation from their zoning laws. See below at 5. Notwithstanding that, three counties in which the Fort Berthold Reservation lies have filed in support of Petitioners. *See* amicus brief of Mountrail, McLean and Ward Counties, North Dakota.

The Tribe has a further specific interest in this case since certain amicus parties filing in support of the Petitioners are non-Indians residing on the Fort Berthold Reservation, including the exclusively non-Indian membership of the North Dakota Committee for Equality, a non-Indian organization which has historically and consistently opposed the exercise by the Tribe of its governmental powers on the Reservation. *See* amicus brief of the Citizens Equal Rights Alliance.

If the Ninth Circuit's decision is reversed, and the Tribe loses zoning control over the parts of its Reservation occupied mostly by non-Indians, the ensuing checkerboard jurisdiction is quite likely to lead to inharmonious and incompatible land use regulations by the Tribe and the local county governments. The Tribe supports the Respondent Yakima Nation and urges that the Ninth Circuit be affirmed. The written consents of Petitioners and Respondent to the filing of this amicus brief are on file with the Clerk.

PARTY SUPPORTED

The Three Affiliated Tribes strongly urge affirmance of the Ninth Circuit's decision in favor of the Respondent Yakima Indian Nation.

ARGUMENT

I. UNIFIED ZONING REGULATION IS ESSENTIAL ON INDIAN RESERVATIONS.

A. Facts Pertaining to the Fort Berthold Reservation.

The Three Affiliated Tribes is a federally recognized tribe consisting of the Mandan, Hidatsa and Arikara Tribes of Indians. Currently the Tribe consists of about 6,000 enrolled members. The Tribe is organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 476. The Tribe has a constitution and bylaws approved by the Secretary of the Interior on June 29, 1936. Its government consists of an elected tribal council and a comprehensive code of laws governing the Reservation. The Tribe also has an executive branch (the tribal chairman and the tribal agencies) and a judicial branch (court and judges).

The Tribe entered into a Treaty of Peace and Friendship with the United States in the Treaty of Fort Laramie, September 17, 1851, 11 Stat. 749, II Kappler 594. This Treaty recognized the Tribe as owning a vast territory in North and South Dakota, Montana and Wyoming. By a series of Executive Orders in 1868, 1870 and 1880, and a cession consummated by the Act of March 3, 1891, 26 Stat. 1032, the Tribe's Reservation was reduced to approximately one million acres in west central North Dakota, which it has remained ever since. See map.

In 1910, Congress opened the northeast half of the Reservation [2] to non-Indian settlement. Act of June 1, 1910, 36 Stat. 455.[3] White settlers subsequently occupied

[2] That is, lands lying north and east of the Missouri River. The sale of land within the Reservation boundaries does not remove the land from the Reservation. *Seymour v. Superintendent*, 380 U.S. 359 (1962); II Opinions of the Interior Solicitor 2009, M-36802 (1970).

[3] The Act reserved a portion of the open land (the southern third thereof) for allotment in trust to tribal members. The allotments

the northeast two-thirds of the opened area (called the "Northeast Quadrant"). Some allotments were also made in the Northeast Quadrant. There are two largely non-Indian towns located in the Northeast Quadrant, New Town (pop. 1335) and Parshall (pop. 1059). See map. Tribal trust and fee lands and individual Indian trust and fee lands are located in both towns.[4]

Disputes have arisen concerning the extent of the Fort Berthold Reservation boundary and its attendant jurisdiction. For example, in *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972), the Eighth Circuit held that the 1910 Act did not result in the disestablishment of the Northeast Quadrant of the Reservation, and therefore the City of New Town did not have criminal jurisdiction over Indians committing crimes within the town's general jurisdiction. *Id.* at 127.[5]

In terms of land use and zoning, so far only potential conflicts exist. The Reservation lies within the boundaries of the counties of McLean, McKenzie, Mountrail, Dunn, Mercer and Ward (see map). Of these six counties, five have passed zoning ordinances. Each ordinance expressly states as its purpose the promotion of the health and general welfare of the county citizens. *See* Ward Co. Zoning Res. No. 6, Art. 1, § 1; Mercer Co. Zoning Ord. § 1.2; McLean Co. Zoning Ord. § 1.2; Zoning Ord. Dunn Co., N.D., Art. I, § 1.3; Mountrail Co. Zoning Ord., Art. 1, § 2.

Of the five counties with zoning ordinances, four (McLean, Ward, Dunn and Mercer) have expressly excluded Reservation lands from the application of their

were made before the non-Indians were allowed to select land. In addition, the rights to the coal deposits in portions of the opened area were reserved to the Tribes.

[4] In New Town, Indian owned land constitutes 28% and in Parshall, Indian owned land constitutes 29% of the area.

[5] *Cf. also Chase v. McMasters*, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978).

zoning ordinances. One county—McLean—expressly recognized the tribal zoning ordinance of the Fort Berthold Reservation. McLean Co. Ord., § 1.3. One county—Mountrail—has implicitly asserted jurisdiction over Reservation lands.[6] In addition, the towns of New Town and Parshall have also enacted municipal zoning ordinances. *See* Parshall Zoning, Ch. 12; New Town Zoning Ord., Ch. 7.

The Tribe very recently enacted a tribal zoning law which applies to all lands within the Reservation. The Code has as its stated purpose the need to protect the stability of reservation lands and "to otherwise promote the public health, safety, morals and general welfare" within the boundaries of the Reservation. § 2. There are five zoning classifications: (1) Agricultural; (2) Recreational; (3) Reserved Status Land (Cultural and Wildlife Resources); (4) Commercial and Energy Development; (5) Residential.

Of these, the classification unique to the Tribe—nothing comparable is found in any county zoning ordinance—is the Reserved Status zone. The Reserved Status zone is established "to insure continuation of the Tribal Natural Resources and to insure the treaty rights of Tribal members to have an area in which they may camp, hunt, fish and pursue the traditions of their culture. Protection and preservation of these resources is a necessity for the Indian traditions and cultural way of life." Tribal Zoning Ord. § 12. Its stated purpose is "to prevent uncontrolled development which could result in irreversible damage to important Tribal items such as historical items, cultural resources, religious artifacts, and wildlife habitats." *Id.* Specifically, the Tribe is seeking to prevent development in the Reserved Status

[6] Its ordinance provides it is applicable to all incorporated and unincorporated lands in the county. Requests for exclusion by incorporated or unincorporated areas that have adopted zoning ordinances are permitted. Mountrail Co. Zoning Ord., Art. II, § 1.

zone in order to preserve traditional tribal grounds and other cultural sites.

At this time, the Tribe has recently zoned for Reserved Status certain tribal, individual trust and non-Indian fee lands along the Missouri River and Lake Sakakawea, including areas in the Northeast Quadrant, that are sites of historical, cultural and religious significance such as teepee rings, ancestral burial grounds and old village sites. *See* Tribal Land Use Plan and Code, Sec. 12. There is also a parcel of tribal land zoned Reserved Status, east of New Town, that holds a community hall where traditional tribal ceremonies, dances and rituals occur. In addition, the Tribe has designated for Reserved Status certain lands in the Northeast Quadrant, both Indian and non-Indian, that were former burial sites. Skeletal remains and artifacts have also been recovered from non-Indian lands and these lands have been designated Reserved Status. This is a particularly important issue to most tribes since such remains and artifacts have often been turned over by the non-Indian landowner or tenant to state historical societies and universities for study rather than returned to the Tribe for reburial. The Tribe is attempting to protect these lands and remains from this type of abuse.

Finally, the Tribe is actively regulating commercial recreational facilities on lands fronting on Lake Sakakawea to prevent overcrowding and overbuilding. *See id.* Sec. 10.

The Tribe has enacted other regulatory codes applicable to the entire reservation, including laws applicable to beekeeping; alcohol control; fish, game and recreation; oil and gas; Indian preference and employment; personal property repossession (geared to regulation of non-Indian creditors); business licensing; and pesticides.[7]

[7] The Tribe recently entered into an agreement with an oil and gas company whereby the company agreed to be bound by all

In an area closely related to zoning and land use—viz. environmental laws—the Environmental Protection Agency ("EPA") has recently delegated its authority to control the application of pesticides under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) to the Tribe to the exclusion of the State of North Dakota.[8] 7 U.S.C. § 136b. The Tribe will control the application of pesticides on the entire Reservation, both trust and fee lands. 51 FR 22860 (1986). This delegation was initially opposed by non-Indian landowners who asserted they had no voice in tribal government and that the delegation of jurisdiction was unlawful. 51 FR 22861 (1986). The EPA responded that it was not delegating jurisdiction to the Tribe, because the Tribe already had inherent jurisdiction. In addition, the Tribe provided an administrative appeal process to answer the concern that the non-Indians had no voice in tribal government. *Id.* The non-Indian landowners are now operating on the assumption that the Tribe does have authority to regulate pesticides.

B. A Single Reservation Should Be Governed By a Single Zoning Law.

It is the Tribe's position that the Ninth Circuit's finding of a strong tribal interest in zoning is obvious and powerful, and clearly meets the test set forth in *United States v. Montana*, 450 U.S. 544 (1981). In *Montana*, the Court held that a tribe retains inherent sovereignty and authority to regulate conduct of non-Indians on fee

applicable tribal laws governing mineral exploration and development activities imposing requirements for Indian preference and employment contracts, both on fee and trust land, in the Northeast Quadrant of the Reservation.

[8] Since 1981, and in cooperation with EPA, the Tribe has actively regulated the application of pesticides on all lands, both Indian and non-Indian within the boundaries of the Reservation. This delegation, in 1985, was the first formal delegation by the EPA to a Tribe under FIFRA.

land where the conduct "threatens . . . the health or welware of the tribe." *Id.* at 566. Under this test, zoning laws must be applicable to everyone, including non-Indians on fee land. That is, *zoning and land use planning are health or welfare based laws that must be comprehensive within a contiguous area* like a reservation. To permit checkerboard zoning is to defeat the entire purpose of land use planning since there is a natural conflict between a tribe's interest in preserving its natural and historical resources and the environment of its reservation[9] and the desires of non-Indian developers, and local and state governments that are willing to encourage such development.[10]

In addition, though the problem of the division of zoning authority between two governments may not seem unduly burdensome, on reservations with a large land base, like Fort Berthold, the situation is exacerbated by multiple county and municipal zoning authorities. Non-Indian land on the Fort Berthold Reservation would be governed by eight different zoning ordinances, depending on which county or town the land was in, each of which conflicts to some extent with the Tribe's own ordinance. See above at 6. Trust land would be governed by the

[9] It is clear that all tribes have an interest in protecting sacred and historical areas, cemeteries, etc. In addition, many reservations are endowed with valuable resources and environments generally undisturbed by development and attempts at urbanization. *See Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900, 903 (10th Cir. 1982). Such interests do not necessarily have the same priority with non-Indians and local governments wanting to develop such lands as is the case with both Petitioners Brendale and Wilkinson—the desire to develop the land is their overriding consideration.

[10] Indeed, to permit local non-Indian authorities to zone Indian lands is to encourage the further dissolution and deterioration of the reservation trust land base. Just as voracious settlers once scrambled for ownership of Indian lands, the non-Indian fee owners now seek to develop their property without regard to the preservation of certain aspects of the Reservation.

tribal code so the potential exists for the Fort Berthold Reservation to be governed by nine governments in zoning. This is an unwieldly and unworkable situation. The Tribe's interests could never be protected in such a situation. And this is not a theoretical threat.

That the interests of tribes rate a low priority or conflict with States' interests in zoning and other health and safety matters is abundantly clear from a review of recent case law.

In *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982), non-Indians owning fee patented lands on the Wind River Reservation sought to develop their lands by subdividing it into residential lots. This plan was approved by the county government's Planning Commission. However, this proposed development would have occurred near areas where traditional tribal ceremonies were held, and near other Indian activities that the Court found were substantial. Apparently, the County Planning Commission gave no consideration to such concerns. The development was prevented only by that Court's intervention and holding that the Tribe's ordinance had to apply to the non-Indian fee land in the interest of tribal sovereignty and through the recognition that the Tribe had a legitimate interest in preserving the character of its land through comprehensive zoning on its *entire* reservation.

In *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1976), Indians sought to place mobile homes on their trust lands zoned General Agricultural under the county's ordinance. *Id.* at 657. To obtain a variance, a fee had to be paid. In addition, permits for various utilities had to be obtained by payment of a fee. Because the county refused to issue the permits without payment, which the Indians could not afford, utilities, water and sanitation services were denied to the Indians who were to reside in the development. *Id.* at 658. The Court held

the county did not have jurisdiction under P.L. 280, pointing out that there is a tension between Indian and non-Indian interests in development, but as to Reservation lands, the Indians' interest and priorities in providing housing and in controlling development of the reservation necessitated the exclusion of county zoning. *Id.* at 664.

In *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987), a mobile home park was operated by a non-Indian on alloted Indian trust land in the Agua Caliente Reservation. The Indian allotment owners were to receive a portion of the rental payments for the mobile homes as compensation for the use of their allotment. The City of Rancho Mirage enacted a rent control ordinance (a land use law) imposing limits on rent increases on all mobile home parks, and attempted to enforce this ordinance against the allotment owners. *Id.* at 1389. The Court held that such land use regulation was within the inherent sovereign authority of the Tribe, and that concurrent jurisdiction would "nullify" the Tribe's authority. *Id.* at 1393. Thus, the Court held, the City's ordinance could not apply.

In *Governing Council of Pinoleville Indian Community v. Mendocino Co.*, 684 F. Supp. 1042 (N.D. Cal. 1988), the Pinoleville Indian Community Tribal Council (Council) placed a moratorium on industrial development on all lands within its reservation in order to work up a plan for development and a zoning ordinance. The non-Indian landowner applied to the County to operate an asphalt and a cement plant on its lands located within the reservation. The County approved the application over the objection of the Council. *Id.* at 1044. The Tribe sought an injunction arguing that under the *Montana* test, its interests were directly affected by the industrial use. Among other things, the plants would be extracting gravel from a creek designated for protection by the Tribe as a salmon spawning ground. The Court granted

the injunction finding the Tribe's interest substantial. *Id.* at 1045.

In *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982), the record showed that the State of Washington was requested to enforce its building and safety regulations against a non-Indian general store on fee patented property within the Quinault Reservation. When the state failed to do so, the Tribe sought to enforce its own tribal code. The Ninth Circuit affirmed the application of tribal law as a regulation necessary to the protection of the health and welfare of the Tribe. *Id.* at 366. *See Washington v. U.S. Environmental Protection Agency*, 752 F.2d 1465, 1470 (9th Cir. 1985) (where tribes expressed fears of reservations becoming "dumping grounds" if the state was granted control over hazardous waste disposal on reservations; such authority was denied the state as without jurisdiction). *See also Blue Legs v. U.S. Environmental Protection Agency*, 668 F. Supp. 1329, 1339 (D.S.D. 1987) (where the Court held that the Oglala Sioux Tribe and not the EPA or the state had the inherent sovereign authority to enforce federal laws concerning solid waste disposal on the Reservation).

From this brief review it is clear that conflicts can and will arise between Indian and non-Indian interests in land use planning and zoning. It is also clear that if a tribe's sovereignty is to be preserved and if the health and safety and other interests of a tribe are to be protected, control over the entire reservation is essential.

C. Single Reservations Are Already Governed By Single Tribal Environmental Laws.

In an area related to zoning—environmental regulation—Congress has clearly found that tribal sovereignty requires control over the entire reservation, including non-Indian, feepatented land. In 1984, the EPA issued a policy statement concerning environmental programs on reservations that emphasized tribal sovereignty and

the recognition that as an aspect of that sovereignty, tribes should exercise control over their reservation environment. EPA, Indian Policy Statement (Nov. 1984); 15 Environment Rptr. 1312 (Summary).

In 1986, Congress affirmed the EPA policy by amending the Clean Water Act, 33 U.S.C. § 1377, the Safe Drinking Water Act, 42 U.S.C. § 300f, and the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. 9601-9675, to expressly permit qualifying tribes to assume jurisdiction over environmental programs on reservations regardless of land ownership.

Indeed, the legislative history of the Clean Water Act indicates that Congress expressly considered non-Indian fee patented land and delegated authority to tribes over these lands as a necessary aspect of tribal sovereignty. A memorandum describing the Indian provisions stated: "A. Indian tribes are self-governing, exercising limited powers of inherent sovereignty within their reservations. B. *In the exercise of that power, Indian tribes have the right to regulate lands and other natural resources within the reservation, including non-Indian owned fee lands or resources.*" 133 Cong. Rec. H184 (1987). (Emphasis added.)

Zoning laws and environmental laws are offspring of the same policy considerations, that is, the health, safety and general welfare of the populace. Congress has recognized that tribes need to control their environment. Such policy should apply equally to zoning, which is a type of environmental regulation.

On the Fort Berthhold Reservation, the EPA delegated to the Tribe the authority, to the exclusion of the state, to regulate the application of pesticides over the *entire* reservation pursuant to FIFRA. 7 U.S.C. § 136b; 51 C.F.R. 22860 (1986). See p. 8 and n.8 above. This delegation was initially opposed by non-Indians holding

fee land on the Reservation, but there is now general acceptance of the Tribe's sovereign authority.[11] This delegation is a very real and practical recognition by the federal government that tribes must have authority over their entire reservation if they are to effectively administer these federal environmental programs to meet their unique needs and interests.

The same conclusion must be made with respect to zoning laws.

Respectfully submitted,

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[11] A related area of regulation relevant to the Tribe is coal mining. The Tribe owns vast areas of coal deposits located under fee land in the open area. Congress has placed authority over mining in the hands of the Secretary of Interior, not the State, until a suitable method of transferring such authority to tribes can be determined. 30 U.S.C. § 1300.

(19) (19) (19)

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Nos. 87-1622, 87-1697, and 87-1711
Consolidated

In The
Supreme Court of the United States

October Term, 1988

PHILIP BRENDALE,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Respondent.

BRIEF OF THE NAVAJO NATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The Issues in this Case Are Governed by the Proper Understanding of "Inherent Tribal Sovereignty" and the Proper Rules of Construction Applicable to Indian Cession Treaties and Subsequent Federal Legislation.	4
II. Federal Legislation and the Yakima Treaty Guarantee the Yakima People the Right to Complete Self-Government, Including Full Territorial Jurisdiction Within the Yakima Reservation.	13
III. Petitioners' Reliance on the 1887 General Allotment Act is Misplaced, and *Montana v. United States* Lands No Principled Support to Their Position.	16
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 10

Arizona v. California, 373 U.S. 546 (1963) 10

Beecher v. Wetherby, 95 U.S. 517 (1877) 19

Bryan v. Itasca County, 426 U.S. 373 (1976) 11

Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906) 22, 26

California v. Cabazon Band, 480 U.S. 202 (1987) 17

Carpenter v. Shaw, 280 U.S. 363 (1930) 10

Catholic Missions v. Missoula County, 200 U.S. 118 (1906) 25

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 7

Choate v. Trapp, 224 U.S. 665 (1912) 9

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 10, 20

Chouteau v. Molony, 57 U.S. (16 How.) 203 (1854) 8

Clark v. Smith, 38 U.S. (13 Pet.) 195 (1939) 8

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 10, 20

Crow Tribe v. United States, 284 F.2d 361 (1961) 18

DeCoteau v. District County Court, 420 U.S. 425 (1975) 10

Elk v. Wilkins, 112 U.S. 94 (1884) 9

Ex parte Crow Dog, 109 U.S. 556 (1883) 9

Fisher v. District Court, 424 U.S. 382 (1976) 25

TABLE OF AUTHORITIES—Continued

Page

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 7, 24

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 94 L.Ed.2d 10 (1987) 10, 13, 24

Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) ... 8

Jones v. Meehan, 175 U.S. 1 (1899) 9, 12

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) 10

Mattz v. Arnett, 412 U.S. 481 (1973) 10

McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164 (1973) 10, 11, 25

Menominee Tribe v. United States, 391 U.S. 404 (1968) 10, 13

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 10

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 25

Mitchell v. United States, 34 U.S. (9 Pet.) 711 (1835) 8

Montana v. United States, 450 U.S. 544 (1981) ..... *passim*

Morris v. Hitchcock, 194 U.S. 384 (1904) 25

National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1987) 24

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 11

Northern Pacific Railway v. United States, 227 U.S. 355 (1913) 12

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 23

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 8, 10

TABLE OF AUTHORITIES—Continued

	Page
Puyallup Tribe v. Washington Game Dept. 433 U.S. 165 (1977)	21
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)	22
Solem v. Bartlett, 465 U.S. 463 (1984)	10, 12, 22
Talton v. Mayes, 163 U.S. 376 (1895)	9, 17
The Cherokee Tobacco, 78 U.S. (11 Wall.) 652 (1871)	9
The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867)	8
The New York Indians, 72 U.S. (5 Wall.) 761 (1867)	8
The Seneca Lands, 1 Op.Atty.Gen. 465 (1821)	8, 24
Thomas v. Gay, 169 U.S. 264 (1898)	9, 25
United States v. Celestine, 215 U.S. 278 (1909)	22
United States v. Holt State Bank, 270 U.S. 49 (1926)	16, 19, 20
United States v. Kagama, 118 U.S. 375 (1885)	9, 25
United States v. Mazurie, 419 U.S. 544 (1975)	10
United States v. McBratney, 104 U.S. 521 (1882)	9
United States v. Santa Fe Pacific R. R. Co., 314 U.S. 339 (1941)	7, 10, 14, 20
United States v. Wheeler, 435 U.S. 313 (1978)	23
United States v. Winans, 198 U.S. 371 (1905)	9, 15
Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685 (1965)	11
Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980)	23, 26
Washington v. Washington Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979)	10, 12

TABLE OF AUTHORITIES—Continued

	Page
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	11
Williams v. Lee, 358 U.S. 217 (1959)	11, 25, 26
Winters v. United States, 207 U.S. 574 (1907)	9
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)	*passim*
Yakima Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987)	4

STATUTES

18 U.S.C. § 1162	17
18 U.S.C. § 1153	17
25 U.S.C. ch. 5	7
25 U.S.C. § 331 *et seq.*	3
25 U.S.C. § 349	17
28 U.S.C. § 1360	17
33 U.S.C. § 1251 *et seq.*	11
33 U.S.C. § 1377	11
42 U.S.C. § 300f *et seq.*	11
42 U.S.C. § 300j-11	11
42 U.S.C. § 9601 *et seq.*	11
42 U.S.C. § 9626	11
Act of August 7, 1789, ch. 8, 1 Stat. 50	13
Act of June 30, 1834, ch. 161, 4 Stat. 729	7
Act of August 14, 1848, § 14, 9 Stat. 323	3, 13

TABLE OF AUTHORITIES—Continued

	Page
Treaty of September 9, 1849, 9 Stat. 974	1
Act of 1850, ch. 16, § 5, 9 Stat. 437	12
Act of June 5, 1850, ch. 6, § 5, 9 Stat. 437	3
Act of June 5, 1850, ch. 16, §§ 5 & 1, 9 Stat. 437	14
Treaty of Fort Laramie of 1851, 11 Stat. 749	17
Act of March 2, 1853, § 5, 10 Stat. 172	14
Treaty of June 9, 1855, 12 Stat. 951	3
Treaty of June 1, 1868, 15 Stat. 667	1
Curtis Act of June 6, 1898, ch. 517, § 28, 30 Stat. 495	17
1920 Crow Allotment Act, 41 Stat. 751	21
Act of June 2, 1924, ch. 233, 43 Stat. 253	12
OTHER AUTHORITIES	
Barsh & Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 Wash.L.Rev. 627 (1981)	20
R. Barsh & J. Henderson, The Road: Indian Tribes and Political Liberty 257-269 (1980)	12
Northwest Ordinance of 1787, Art. III	13
23 Op.Atty.Gen. 214	23
U.S. Const., art. I, sec. 8	28

INTEREST OF AMICUS CURIAE

The Navajo Nation is a dependent Indian nation of the United States with approximately 173,000 citizens and a territory of nearly 25,000 square miles, located in the "Four Corners" area of the southwestern United States. Like the Yakima Nation, the Navajo Nation in the nineteenth century entered into treaties with the United States whereby the Navajo people ceded a substantial portion of their national territory and entered into a relationship of dependency with the United States. In return the United States guaranteed its protection of the Navajo people's right of self-government and the territory withheld from cession and reserved to the Navajo Nation. Treaty of September 9, 1849, 9 Stat. 974; Treaty of June 1, 1868, 15 Stat. 667.

The territory of the Navajo Nation has been expanded through the years by congressional and presidential action, and is now situated within the boundaries of three states: Arizona New Mexico and Utah. Each of these States has created counties with boundaries which in part overlap the territory of the Navajo Nation.

Of the approximately 15.6 million acres of land within the boundaries of the Navajo Nation, approximately 618,000 acres are in fee ownership, and approximately 267,000 are owned by the Federal government, with the balance owned by the Navajo Nation. Of the lands owned in fee, approximately one-half are owned by non-Indians. These lands left tribal ownership as a result of the allotment process engendered by the 1887 General Allotment Act, as amended, 25 U.S.C. § 331 *et seq.*, and exhibit the familiar "checkerboard" pattern.

The Navajo Nation exercises exclusive land use regulatory jurisdiction over all lands within its boundaries to the exclusion of the neighboring state and county governments.[1] The right of the Navajo people to their homeland and to govern within that homeland is a retained original, natural right, guaranteed by federal legislation and the Nation's treaties with the United States.

The Navajo Nation wishes to present its views to this Court on three issues which have been raised in this case and which are of great concern to the Navajo people: the proper understanding of inherent tribal sovereignty, the proper construction of treaties of cession with Indian nations, and the effect of allotment era legislation on the retained powers of self-government of Indian people.

The Navajo Nation believes that the Petitioners' proposed construction of the Yakima Treaty and their proposed construction of the 1887 General Allotment Act are legally insupportable and threaten the rights reserved to the Navajo people under their treaties, as well as the reserved rights of other Indian nations.

The Navajo Nation therefore respectfully submits this brief as *amicus curiae* in order to assist this Court in its determination of these important issues.

———o———

[1]The boundaries of the Navajo Nation within New Mexico are partly subject to dispute. Within these disputed areas, the state and county governments have asserted and exercised limited partial jurisdiction (over the objection of the Navajo Nation) concurrently with the Navajo Nation.

SUMMARY OF ARGUMENT

When first encountered by Europeans, Indian people were sovereign under the same principles of natural law upon which our democratic form of government is founded. European powers, and later the United States, recognized the national character of the tribal governments they encountered, and conducted relations with the Indian nations through treaties.

Prior to the Yakima Treaty in 1855, the natural rights of Indian people to self-government and the national character of their governments was recognized and protected by federal legislation. Act of August 14, 1848, § 14, 9 Stat. 323; Act of June 5, 1850, ch. 6, § 5, 9 Stat. 437. By treaty on June 9, 1855, 12 Stat. 951, the Yakima people ceded a vast portion of their territory to the United States, reserving the territory now known as the Yakima Indian Reservation, and entered into a relationship of dependency with the United States. Reserved to the Yakima people, and vested in their government, the Yakima Nation, were full powers of self-government within their reservation, including full territorial jurisdiction. These rights were recognized and protected by the treaty provisions which placed the Yakima Nation under the protection of the United States and by which the United States reserved the Yakima Reservation to the Yakima people.

These inherent natural rights have never been impaired by Congress, neither by the 1887 General Allotment Act, as amended, 25 U.S.C. § 331 *et seq.*, nor by any other federal legislation. *Montana v. United States*, 450 U.S. 544 (1981), provides no principled support for Petitioners' position. That case is anomalous, for it incorrectly assumed certain facts, asked the wrong questions, re-

versed long-standing presumptions and rules of construction applicable to tribal rights, and disregarded controlling precedent.

This Court should continue to uphold and apply the time-honored understanding of Indian peoples' inherent political rights and the rules of construction applicable to Indian cession treaties and subsequent federal legislation.

For the foregoing reasons, the Ninth Circuit opinion upholding the Yakima Nation's jurisdiction in *Yakima Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987), should be affirmed with directions to enter judgment in favor of the Yakima Nation.

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ARGUMENT

I. The Issues in this Case Are Governed by the Proper Understanding of "Inherent Tribal Sovereignty" and the Proper Rules of Construction Applicable to Indian Cession Treaties and Subsequent Federal Legislation.

The key to deciding this case lies in the proper construction of the 1855 Yakima Treaty and subsequent federal legislation. The proper construction of Indian treaties and the inherent rights reserved to Indian nations under those treaties must begin with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the cornerstone of the common law of the relationship of Indian nations to the United States and its constituent states. The proper construction of subsequent federal legislation later grew out of the principles established in that case.

The conflict in *Worcester* between the Cherokee Nation and the State of Georgia was fundamental. The

Cherokee Nation had been allied with the British during the Revolution, and after Britain's defeat had entered into a relationship of dependency with the United States by treaty. In 1829 the State of Georgia purported to extend its laws into the Cherokee Nation, which lay within the chartered boundaries of Georgia.

In deciding the case, the Court traced the political and legal status of Indian nations within Western law and practice, from the time of Europeans' first contact through the time of the Court's decision, relying during the colonial era on International custom and the practices of Great Britain and, after the Revolution, on federal policies, treaties and legislation. The Court found that from the beginning of relations with the various Indian nations of America, the colonizing European governments, and later the United States, had recognized the national character of the native governments they encountered. Consistent with principles expressed in this Nation's Declaration of Independence, this Court found that the Indian nations, when first encountered, possessed all the rights and authority of any sovereign nation as a matter of natural law.[2] *Worcester*, at 555, 559-561, 581-582.

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[2] The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . .

Worcester, at 559. In *Worcester* and other decisions of the Marshall Court, however, this Court did hold that discovery had one important consequence: by convention the European nations had agreed that they would acquire vis-a-vis each other the exclusive right to maintain relations with the Indian nations within the particular territories which each nation had discovered. As Chief Justice Marshall explained, "It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it." *Id.* at 544.

Chief Justice Marshall, writing for the Court, went to great lengths to explain fully the proper construction of the Cherokees' treaties, *id.* at 551-556, and in particular the relationship contemplated by the provisions placing the Cherokee Nation under the protection of the United States. Marshall explained that "[t]his relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master." *Id.* at 555.[3]

Justice McLean, in his concurring opinion, queried

> What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government. . . . *The only requisite is, that each of the contracting parties shall possess the right of self-government,* and the power to perform the stipulations of the treaty. . . .

Id. at 581 (emphasis supplied). As to how the language of treaties should be construed, he eloquently summarized the principles that had been applied by Marshall earlier in the opinion.

> The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

Id. at 582.

[3] These articles [of protection] are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence —its right to self-government, by associating with a stronger, and taking its protection. A weak State, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a State.

Id. at 560-561.

Both the majority and concurring opinions in *Worcester* also found support for their conclusions in federal legislation. Beginning shortly after the adoption of the Constitution, Congress had passed statutes designed to regulate trade and intercourse with the Indian nations. See, e.g., Act of June 30, 1834, ch. 161 4 Stat. 729 (codified as carried forward and amended in 25 U.S.C., ch. 5.) According to the Court, these acts treat Indian nations

> as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, *within which their authority is exclusive* . . . .

Id. at 556-557 (emphasis supplied). See also *United States v. Santa Fe Pacific R. R. Co.*, 314 U.S. 339, 347-348 (1941).[4]

[4] The Worcester case was not, of course, the first time the Court had the opportunity to consider these issues. The previous year in *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831), the Court had similarly articulated the status of Indian nations. In that case, Chief Justice Marshall characterized the Cherokees and other Indian nations who had entered into relationships of protection and dependency with the United States as "domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian." *Id.* at 17.

See also *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 142-143 (1810) ("[t]he nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the state.") Justice Johnson, in dissent, urged that Georgia

(Continued on following page)

Until 1871, neither Congress, the Executive Branch nor this Court departed from the principles, analyses or holdings of *Worcester* and its precendents. See, e.g., *Mitchell v. United States,* 34 U.S. (9 Pet.) 711 (1835); *Clark v. Smith,* 38 U.S. (13 Pet.) 195 (1939); *Chouteau v. Molony,* 57 U.S. (16 How.) 203 (1854); *The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867); *The New York Indians,* 72 U.S. (5 Wall.) 761 (1867).

The year 1871 marked the first intrusion into tribal sovereignty when Congress forbade the President from entering into any further treaties with Indian nations, Act of March 3, 1871, 25 U.S.C. § 71,[5] and this Court in

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(Continued from previous page)

"had not a fee-simple in the land in question[,]" because the Indian tribes in question "retain a limited sovereignty, and the absolute proprietorship of their soil. . . . We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people . . ." and queried, "Can, then, one nation be said to be seized of a fee-simple in lands, the right of soil of which is in another nation?" *Id.* at 146-147.

Justice Johnson's understanding that the Trade and Intercourse Acts constituted an assertion of concurrent federal legislative jurisdiction was rejected by the Court 22 years later in *Worcester,* and his query concerning how a state could own "fee title" in lands owned by an Indian tribe was later answered in *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543 (1823). See also *The Seneca Lands,* 1 Op.Atty.Gen. 465, 467 (1821) (rejecting federal authority to intrude upon tribal lands without tribal consent); *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667-670 (1974) (explaining relationship between "naked" fee interest and original Indian title).

[5]The Act of 1877 saved the force and effect of all treaties previously made.

The Cherokee Tobacco, 78 U.S. (11 Wall.) 652 (1871), interpreted the 1868 Internal Revenue Act as having abrogated an Indian treaty by having directly imposed federal authority (a tax on tobacco and other products) within the Cherokee Nation.

Nevertheless, save only as was necessary to justify application of direct Congressional legislation into tribal territories, throughout this era the Court consistently continued to apply the principles of *Worcester.*[6] During this same era the Court clearly enunciated a corollary rule to *Worcester,* that Congressional legislation "should be liberally construed in [the Indians'] favor . . . ." *Choate v. Trapp,* 224 U.S. 665, 675 (1912):

> [I]n the Government's dealings with the Indians the rule is . . . [that] the construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.

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[6]See, e.g., *Ex parte Crow Dog,* 109 U.S. 556 (1883); *Elk v. Wilkins,* 112 U.S. 94, 102 (1884); *United States v. Kagama,* 118 U.S. 375 (1885); *Talton v. Mayes,* 163 U.S. 376, 384 (1895); *Jones v. Meehan,* 175 U.S. 1, 10-11 (1899); *United States v. Winans,* 198 U.S. 371, 381 (1905); *Winters v. United States,* 207 U.S. 574 (1907).

The only exception was the Court's opinions, allowing limited state jurisdiction over the activities of non-Indians. See, e.g., *United States v. McBratney,* 104 U.S. 621 (1882); *Thomas v. Gay,* 169 U.S. 264 (1898).

Ibid. See also *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89 (1918); *Carpenter v. Shaw,* 280 U.S. 363, 366-367 (1930).

In recent years, the Court has continued to rely upon the principles and holdings in *Worcester* and its corollary rule. The Court has continued to uphold and rely upon the inherent natural law source of Indian people's right to self-government,[7] the doctrines of discovery and the reserved rights of Indian nations,[8] the recognition of original tribal rights by the Trade and Intercourse Acts,[9] the principles of treaty construction,[10] the corollary principles of statutory construction and treaty abrogation,[11] and the presumptive inapplicability of state law within Indian reservations, resulting from the preemptive effect

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[7]E.g., *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 94 L.Ed.2d 10, 21 (1987); *Kerr-McGee Corp. v. Navajo Tribe,* 471 U.S. 195, 198 (1985); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982); *United States v. Mazurie,* 419 U.S. 544 (1975); *Menominee Tribe v. United States,* 391 U.S. 404 (1968).

[8]E.g., *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 233-236 (1985) (*Oneida II*), *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667-674 (1974) (*Oneida I*); *Menominee Tribe v. United States,* 391 U.S. 404 (1968); *Arizona v. California,* 373 U.S. 546 (1963); *Santa Fe Pacific R.R. Co. v. United States,* 314 U.S. 339 (1941).

[9]E.g., *Oneida II*; *Oneida I*; *United States v. Santa Fe Pacific R. R. Co.,* 314 U.S. at 347-348

[10]E.g., *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n.,* 443 U.S. 658, 675-676 (1979), modified 444 U.S. 816 (1979); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174 (1973); *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970); *Menominee Tribe v. United States,* 391 U.S. 404 (1968).

[11]E.g., *Solem v. Bartlett,* 465 U.S. 463 (1984); *DeCoteau v. District County Court,* 420 U.S. 425, 444 (1975); *Mattz v. Arnett,* 412 U.S. 481, 504-505 (1973); *Menominee Tribe v. United States,* 391 U.S. 404 (1968).

of Congress' sole authority to regulate commerce with the Indian tribes.[12]

These principles are in reality an expression of the Tenth Amendment principle of government by the consent of the governed. They remind us that Indian people, like the people of the states, are original sovereigns with inherent authority stemming from natural law, who ceded power to the federal government, and thus became diminished sovereigns, retaining all those powers they originally had prior to cession, less those actually ceded.[13]

These principles dictate that any analysis of the authority of the Yakima Nation to zone within its boundaries begin with the concept that, at the time of entering into their Treaty with the United States, the Yakima people possessed by natural law all the rights, powers and authority of a complete sovereign. *Worcester,* 31 U.S. at

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[12]E.g., *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980); *Bryan v. Itasca County,* 426 U.S. 373 (1976); *McClanahan,* 411 U.S. 164 (1973); *Warren Trading Post v. Arizona Tax Comm'n.,* 380 U.S. 685 (1965); *Williams v. Lee,* 358 U.S. 217 (1959).

[13]Indeed, Congress is moving in the direction of treating Indian nations as states. See, e.g., Safe Drinking Water Act Amendments of 1986, 42 U.S.C. § 300j-11 (authorizing the Administrator of the EPA to "treat Indian Tribes as States" for purposes of the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*); Water Quality Act of 1987, 33 U.S.C. § 1377 (authorizing the EPA Administrator to "treat an Indian tribe as a State" for purposes of many provisions of the Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1251 *et seq.*); Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9626 (providing that "[t]he governing body of an Indian tribe shall be afforded substantially the same treatment as a State" with respect to important provisions of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*).

555, 559-561, 581-582. Second, these inherent rights, powers and authority were Congressionally recognized and protected through the 1850 extension to the Oregon territory of the 1834 Trade and Intercourse Act.[14] *Santa Fe Pacific R.R. Co.*, 314 U.S. at 347-348. Third, by entering into the Treaty with the Yakima Nation, the United States implicitly recognized the Yakima people's inherent right to self-government. *Worcester*, 31 U.S. at 559-560, 581. Fourth, the Yakima Treaty constituted "not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted." *United States v. Winans*, 198 U.S. at 381 (construing the Yakima Treaty); *Northern Pacific Railway v. United States*, 227 U.S. 355, 366 (1913). Fifth, the Treaty must be construed as the Yakima Nation understood it. *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. at 174; *Jones v. Meeham*, 175 U.S. at 10-11. Sixth, where a Treaty provision or its understanding by the Yakima Nation appears ambiguous, the ambiguity must be resolved in favor of the Yakima Nation. *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 675-676. Seventh, only Congress has the authority to impair the rights, powers and authority reserved to the Yakima people in their Treaty. *Solem v. Bartlett*, 465 U.S. at 470.[15] Eighth, in case of any conflict between the rights, powers and authority reserved to the Yakima people by their Treaty and the pro-

[14]Act of 1850, ch. 16, § 5, 9 Stat. 437.

[15]Since Indian people were made United States citizens by the Act of June 2, 1924, ch. 233, 43 Stat. 253, the Ninth and Tenth Amendments should now operate to prevent even Congress from adversely affecting Indian people's right to self-government. See generally, R. Barsh & J. Henderson, The Road: Indian Tribes and Political Liberty 257-269 (1980).

visions of a subsequent Act of Congress, the subsequent statute must be construed to avoid impairment of the prior Yakima Treaty. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Finally, "[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power remains intact." *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. at —, 94 L.Ed.2d at 21, quoting from *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 149, n. 14.

II. Federal Legislation and the Yakima Treaty Guarantee the Yakima People the Right to Complete Self-Government, Including Full Territorial Jurisdiction Within the Yakima Reservation.

In 1848 Congress created the territorial government of Oregon (within the boundaries of which the present State of Washington as well as the Yakima Nation are located). Act of August 14, 1848, 9 Stat. 323. Not only did section 1 of the Act include a savings clause protecting existing tribal rights, but section 14 extended to the Oregon territory the protections contained within the Northwest Ordinance of 1787, Art. III.[16]

[16]The Northwest Ordinance ordains and declares:

> as articles of compact between the original States and *the people and States* in the said territory, and forever remain unalterable, unless by common consent, . . . [that t]he utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and, *in their property, rights, and liberty, they never shall be invaded or disturbed*, unless in just and lawful wars authorized by Congress. . . .

(As re-enacted by the Act of August 7, 1789, ch. 8, 1 Stat. 50; emphasis supplied.)

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Two years later Congress extended the provisions of the 1834 Trade and Intercourse Act over the Oregon Territory, and authorized the negotiation of cession treaties with certain Indian nations. Act of June 5, 1850, ch. 16, §§ 5 & 1, 9 Stat. 437. Pursuant to that authorization, five years later on June 9, 1855, the United States government and the Yakima Nation concluded a treaty at Camp Stevens, Washington, 9 Stat. 951, whereby the Yakima people ceded to the United States a large portion of their territory (article 1), and placed themselves under the protection of the United States as a dependent nation (article 8). Reserved from that cession was a tract of territory now commonly referred to as the "Yakima Indian Reservation" (article 2).

An analysis of the Treaty and preceding federal legislation amply demonstrates that complete territorial jurisdiction within the Yakima Reservation is reserved to and recognized in the Yakima Nation, subject only to the Treaty provisions themselves. Prior to the Treaty, the Yakima Nation possessed all the power and authority of an international state, for "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights[.]" *Worcester*, 31 U.S. at 559. These rights were further confirmed and protected by the extension of the Northwest Ordinance of 1787 to the Oregon territory in 1848, and by the extension of the 1834 Trade and Intercourse Act to the

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The Act of March 2, 1853, § 5, 10 Stat. 172, creating the Territorial Government of Washington out of a portion of the old Oregon Territory, saved the force and effect of the 1848 Oregon Organic Act, where not superceded.

Oregon territory in 1850. Further, the fact that the Treaty is a "treaty" recognizes the fact that at the time they entered into the Treaty, the Yakima people possessed all the usual powers of self-government of an international state.[17]

The inherent governmental powers held by the Yakima people prior to the Treaty were retained within the Yakima Reservation. The Yakima people did not cede any of their inherent natural "right, title and interest" in and to the lands and country now called the Yakima Reservation: they "reserved" them from the cession, and this was "a reservation of those [rights] *not granted.*" *Winans*, 198 U.S. at 381 (construing the Yakima Treaty; emphasis supplied).

When the Yakima people "acknowledge[d] their dependence upon the Government of the United States.]" they entered into a relationship of "dependency" with the United States, similar to the relationship of protectorate or dependency characteristic of the British Empire. Inherent and guaranteed in this relationship is the right of the Yakima people to self-government. *Worcester*, 31 U.S. at 560, quoted *infra* at footnote 3.

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[17]See *Worcester*, 31 U.S. at 581-582 (McLean, J., concurring.) The Constitution does not distinguish between treaties made with foreign nations and those made with Indian nations. U.S. Const. art. II, § 2, cl. 2. This was not a mere oversight, for the practice of entering into treaties with Indian nations was well established at the time the Constitution was formed. See, e.g., Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13. See also *Worcester*, 31 U.S. at 559-560 ("*The constitution . . . admits [Indian nations'] rank among those powers who are capable of making treaties.* The words "treaty" and "nation" are words of our own language . . . . We have applied them to Indians, as we have applied them to the other nations of the earth. *They are applied to all in the same sense.*") (Emphasis supplied.)

In addition to the protection afforded by the 1848 Oregon Organic Act and the Act of 1850, in the Yakima Treaty the United States "set apart . . . [the tract of land not ceded] for the exclusive use and benefit of said [Yakima Nation], as an Indian reservation." In other words, not only did the Yakima people reserve to themselves their pre-existing rights within the retained area, but the United States reserved to them their rights as well.[18]

In 1855 when the Yakima treaty was concluded (and in 1859 when it was ratified) neither Congress, the Executive Branch, nor this Court had departed from the analysis, principles or holdings of *Worcester*. Given the common law legal status of Indian nations at that time, protected by federal legislation, and applying the proper rules of construction to the Yakima Treaty, the inescapable conclusion is that, at the time when the relationship betwcen the United States and the Yakima Nation was formed, the Yakima Nation possessed *full territorial jurisdiction* within its reserved territory, which territory and jurisdiction were *protected and guaranteed* by federal legislation and the Yakima Treaty.

III. Petitioners' Reliance on the 1887 General Allotment Act is Misplaced, and Montana v. United States Lends No Principled Support to Their Position.

Petitioners erroneously urge that the 1887 General Allotment Act and the policies behind that Act divested the Yakima Nation of general territorial jurisdiction, at least with respect to non-Indian activities on non-Indian owned lands. However, Petitioners are unable to point to

[18]Territory withheld from cession by an Indian nation is not necessarily reserved by the Federal government. See, e.g., *United States v. Holt State Bank*, 270 U.S. 49, 58 & n.1 (1926).

any provision of the 1887 Act, or of any allotment era legislation, to support their contentions. In fact, there is no piece of general legislation from the allotment era that even addresses the jurisdiction of tribal governments, much less purports to divest tribal governments of general territorial jurisdiction.[19] Petitioners' entire position instead depends upon the statements made by the Court in *Montana v. United States*, 450 U.S. 544 (1981).

Montana was a curious case, for it formulated and applied tests which had never been applied before and have never been applied by this Court since. Two issues were presented in *Montana:* the extent of the Crow Tribe's jurisdiction over hunting and fishing by non-Indians on non-Indian or State-owned land within the aboriginal Crow Reservation, and the ownership of the navigable Big Horn River within that Reservation.

In the Treaty of Fort Laramie of 1851, 11 Stat. 749, the United States and various signatory tribes, including the Crow Tribe, acknowledged designated lands as the

[19]Petitioner Brendale cites section 6 of the 1887 Act, 25 U.S.C. § 349 as having accomplished this result. Section 6 provided in part that "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside[.]" Obviously, this provision does not speak to the issue of tribal jurisdiction and is no more inconsistent with retained tribal jurisdiction than is Public Law 280, 18 U.S.C. § 1162; 28 U.S.C. § 1360. See, e.g., *California v. Cabazon Band*, 480 U.S. 202 (1987). *Cf. Talton v. Mayes*, 163 U.S. 376 (1895) (Tribal prosecution for an Indian-Indian murder, after that crime was made a federal criminal offense by the Major Crimes Act of 1885, as amended, 18 U.S.C. § 1153).

Congress knows how to divest tribal jurisdiction when it wanted to. See, e.g., Curtis Act of June 6, 1898, ch. 517, § 28, 30 Stat. 495 (expressly abolishing tribal courts in the Indian territory).

territories of the respective Indian nations. In the Treaty with the Crows at Fort Laramie in 1868, 15 Stat. 649, the Crow Tribe ceded to the United States all but 8 million acres of their territory, which both parties agreed were to be set apart for the "absolute and undisturbed use and occupation" of the Crow Tribe. Subsequent cession agreements and an act of Congress reduced the reservation to slightly less than 2.3 million acres.

Prior to *Montana*, this Court repeatedly had recognized that cession treaties with Indian nations were not a grant of rights to the Indians, but a grant of rights from them. Although the Crow Reservation is an original Indian title reservation, reserved from cession to the United States, to which the United States therefore held only a "naked" fee interest, the *Montana* majority considered the appropriate question to be

> whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868, . . . or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union.

450 U.S. at 550-551. The majority incorrectly *assumed* that the United States held a fee-simple absolute estate in the lands owned by the Crow Tribe at the time of the 1851 and 1868 Treaties. The appropriate question therefore became to whom had the federal government subsequently conveyed title.[20] The remainder of its analysis was a

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[20]That the Crow Tribe did in fact have original Indian title to the lands in question at the time of the 1868 Treaty had previously been litigated between the Crow Tribe and the United States, with judgment in favor of the Crow Tribe. *Crow Tribe v. United States*, 284 F.2d 361 (Ct. Cl. 1960), cert. denied, 366 U.S. 924 (1961).

search in vain for a conveyance *to* the Crow Tribe in instruments that were instead conveyances *from* the Tribe.[21]

This same analytical error also undermined the analysis of the Crow Tribe's regulatory jurisdiction. Justice Stewart again *assumed* that any authority the Crow Tribe might have must stem from a federal grant. Again ignoring the proper construction of cession treaties as a grant from, not to, the Indian nations, the *Montana* Court

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[21]The majority chiefly relied upon two cases which had involved questions of ownership of submerged lands within Indian reservations. The *Montana* court placed great emphasis on *United States v. Holt State Bank*, 270 U.S. 49 (1926), which it read as having "reject[ed] an Indian tribe's claim of title to the bed of a navigable lake," which lay "wholly within the boundaries of the Red Lake Indian reservation, which had been created by treaties entered into before Minnesota joined the Union." 450 U.S. at 552. "The Crow treaties in this case, like the Chippewa treaties in *Holt State Bank*, fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty." 450 U.S. at 553.

Unfortunately, this heavy reliance on *Holt State Bank* was completely misplaced. The Chippewa Tribe did *not* claim title to the lands in that case; they had ceded them to the United States more than thirty-five years before the case was decided. Instead, the United States claimed that *it* held the land under the terms of the cession agreement, where it had promised to dispose of the ceded lands at a stated price and deposit the proceeds into a trust account for the Chippewa Tribe. *Holt State Bank*, 270 U.S. at 52. *Holt State Bank* simply held that the terms of the cession agreement could not affect the prior rights of the holder of the preemption right ("naked fee") in the ceded lands. Conveyance of the naked fee by the United States to the State of Minnesota prior to the Chippewa cession had conveyed the entitlement to have complete title after the Chippewa Tribe's rights were relinquished. After cession by the Chippewa Tribe, the right to possession immediately attached to the naked fee. This rule is rooted in the discovery doctrine and had been previously applied by this Court in, e.g., *Beecher v. Wetherby*, 95 U.S. 517, 525-526 (1877). See also *Worcester*, 31 U.S. at 543-545. Essentially, the rule is that of "deed by estoppel." The rule

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thought it was important that "[t]he [Crow] treaty nowhere suggested that Congress intended to grant author-

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was again applied in 1941 in *United States v. Santa Fe Pacific R. R. Co.*, 314 U.S. 339. *Cf. County of Oneida v. Oneida Nation*, 470 U.S. 226 (1985).

Furthermore, *Holt State Bank* does not even support *Montana's* holding that the terms of the Crow treaties did not overcome a presumption against conveyance by the United States of its naked fee title to the Crow Tribe. *Holt State Bank* had expressly relied upon the fact that there "was no formal setting apart of what was not ceded" in the Chippewa treaty at issue, taking care to distinguish it from another treaty reserving lands of other Chippewa bands. 270 U.S. at 58 & n.1. In other words, although the Chippewa Tribe had reserved *its* interest at the time the reservation had been created, the United States had not. This left the naked fee free to pass to the State upon its admission to the Union. By contrast, the 1868 Crow Treaty in *Montana* had expressly declared that the unceded Crow lands were set apart for their "undisturbed use and occupation." 450 U.S. at 553.

The other case chiefly relied upon by the *Montana* majority, *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), is totally inapposite to the situation in *Montana*. *Choctaw Nation* upheld the Choctaws' claim of complete title to submerged lands under its removal treaty with the United States, wherein the Federal government had conveyed to the Choctaw Nation lands *outside* of the Choctaws' aboriginal domain in return for the cession to the United States of the Choctaws' entire aboriginal territory. Nevertheless, in his concurring opinion Justice Stevens read *Choctaw Nation* for the proposition that "the strong presumption against dispositions by the United States of land under navigable waters in the territories . . . applie[s] to Indian reservations." 450 U.S. at 567-568. Of course, the presumption only applies to *grants;* and while the Choctaw Reservation in Oklahoma *was* created by a grant from the United States, the Crow Reservation was "created" by the Crow Tribe having *withheld* lands from sale to the United States.

A more in depth analysis of *Montana's* problem with correctly construing and applying prior precedent with respect to land ownership can be found in Barsh & Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 Wash.L.Rev. 627 (1981).

ity to the Crow Tribe to regulate hunting and fishing by nonmembers on nonmember lands." 450 U.S. at 558. The problem, of course, is that the Crow Tribe, like other Indian nations, had pre-existing inherent authority at the time of the 1868 cession treaty, and needed no such federal grant.[22]

The Court admitted that the Treaty "arguably conferred upon the Tribe the authority to control fishing and hunting on [Reservation] lands[,] . . . [b]ut that authority could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.' . . . If the 1868 Treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians." 450 U.S. at 558-559 (footnotes and citations omitted).[23] The Court referred to the 1887 General Allotment Act and the 1920 Crow Allotment Act, 41 Stat. 751, to support this novel proposition. 450 U.S. at 559-561, n.9.

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[22]Crow territory and authority had been recognized and protected by the Federal government prior to the 1868 Treaty by the 1834 Intercourse Act, which applied of its own force.

[23]In other words, the power conferred was that of a private landowner. Such tentativeness is strange considering that the Crow Tribe already owned such lands. See *infra*, fn. 20.

Montana's and Petitioners' assertion that tribal jurisdiction is grounded in such "absolute and undisturbed use and occupation" language confuses governmental jurisdiction with property ownership, and is a misconception of cession treaties. Such jurisdiction is grounded in natural law, delegated by the Indian people to their governments, and reserved to them by having not been granted away. *Montana's* reliance upon *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977), is unfounded: in that case it was the fact that off-reservation fishing rights were to be exercised "in common" with non-Indians that led the Court to conclude that on-reservation jurisdiction over fishing must be concurrent.

At footnote 9 the *Montana* majority again simply ignored the long-standing rules of construction applicable to tribal rights: if the Crow Tribe had treaty-protected inherent authority prior to the Allotment Acts, the proper question was whether Congress intended to take that authority away, *not* whether Congress intended the Crow Tribe to have it. The fact that "the allotment policy was designed to *eventually* eliminate tribal relations[,]" *ibid.* (emphasis supplied), does not support the proposition that Congress did. The proper test to apply to determine whether Congress intended a divestiture is whether Congress "explicitly indicate[d]" or "clearly evince[d]" such an intent. *Solem v. Bartlett,* 465 U.S. 463, 470 (1984), quoting from *United States v. Celestine,* 215 U.S. 278, 285 (1909) and *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 615 (1977). Absent such "substantial and compelling evidence of a congressional intention to diminish "tribal authority, the Court should be "bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place[.]" *Solem,* 465 U.S. at 472.

Further, the concept that conveyances of private property interests also convey immunity from governmental authority is foreign to western law. *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906), decided at the height of the allotment era, and paradoxically cited by the *Montana* Court for support, explained that such a theory "is too unique and anomalous to invoke assent." 135 F. at 950. "[T]he jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land they occupy in it, . . . nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners." 135 F. at

951-952. Later, the Circuit Court again addressed the issue, quoting from 23 Op.Atty.Gen. 214, that "the legal right to purchase land within an Indian nation *gives to the purchaser no right of exemption from the laws of such nation. . . .*" 135 F. at 953 (emphasis supplied).

Turning to the question of inherent tribal authority, Justice Stewart simply declared, without citation to authority, that " 'inherent sovereignty' is not so broad as to support the application of [the Crow Tribe's hunting and fishing regulations] to non-Indian lands." 450 U.S. at 563. The only explanation offered was based upon this Court's recent opinions in *United States v. Wheeler,* 435 U.S. 313 (1978) and *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978). Unfortunately, although the majority quoted from *Wheeler* and discussed *Oliphant, it neither mentioned nor applied the test formulated in those cases.*

Oliphant had held that tribal governments had impliedly been divested of certain powers, but *only* "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government. . . ." *Washington v. Confederated Colville Tribes,* 447 U.S. 134, 154 (1980). The majority attempted no such analysis of possible overriding federal interests, simply assuming that

> the principles upon which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.

450 U.S. at 555.[24]

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[24]This Court recently rejected such an extension of *Oliphant* in another case involving the extent of the Crow Tribe's juris-

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The majority apparently assumed without explanation that there is an overriding federal interest in divesting tribal governments of all authority over non-Indians.[25] Rather than an analysis of how, when and why tribal governments might have lost their preexisting authority, the new *Montana* test assumes that they have lost that authority unless an analysis of tribal interests supports its retention.

None of the cases cited by the majority as support for its new test had ever mentioned or applied such a test. Indeed, a careful review of each of those cases reveals no holdings and virtually no language which support the propositions for which they were cited.

As support for the proposition that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes," 450 U.S.

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diction over non-Indians on non-Indian lands. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855-856 (1987). Significantly, this Court did not apply the *Montana* test in that case. See also *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

[25]The *Montana* majority found support for this proposition in Justice Johnson's "concurrence" in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), "the first Indian case to reach this Court—that the Indian tribes have lost any 'right of governing every person within their limits except themselves.'" 450 U.S. at 565 (quoting *Oliphant*, 435 U.S. at 209). Of course, Justice Johnson actually was *dissenting* in *Fletcher*, and his opinion did *not* say that tribes had lost "any right" of governing other persons. Johnson merely thought that the Trade and Intercourse Acts were a federal assertion of concurrent jurisdiction, *Fletcher*, at 146-147, and his views obviously did not have the support of the majority of the Court, and were later rejected by both this Court and the Executive Branch. See, e.g., *Worcester*, 31 U.S. at 556-557; *The Seneca Lands*, at 467.

at 564, the majority cited to portions of four cases, three of which, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), *Williams v. Lee*, 358 U.S. 217, 219-220 (1959), and *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 171 (1973), were merely analyzing the extent of state authority over Indian affairs under the "infringement" test. The fourth, *United States v. Kagama*, 118 U.S. 375, 381-382 (1885), was a case upholding a federal prosecution on a California Indian reservation, which had briefly mentioned that Indian tribes had "the power of regulating their internal and social relations."

As support for the proposition that a tribal government may regulate non-Indian conduct on non-Indian lands "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe[,]" 450 U.S. at 566, the majority again cited to the "infringement" test language in *Williams v. Lee*, 358 U.S. at 220, and in *Fisher v. District Court*, 424 U.S. 382, 386 (1976), which were merely analyzing the extent of state authority within Indian reservations. The two other cases cited, *Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129 (1906) and *Thomas v. Gay*, 169 U.S. 264, 273 (1898), were simply cases upholding territorial taxes on non-Indians within Indian reservations.

Finally, to support the proposition that a tribal government may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members," 450 U.S. at 565, the Court cited to four cases, each of which is merely an example of where non-Indians *had* entered into such consensual relationships. *Morris v. Hitchcock*, 194 U.S. 384 (1904), had upheld a tax of the Chicka-

saw Nation on non-Indians, but never relied upon "consensual relationships" to support its holding. *Buster v. Wright,* 135 F. at 950, upheld a tax by the Creek Nation on non-Indians, but its analysis completely conflicted with the analysis in *Montana.* The Court in *Buster* rejected the theory that jurisdiction follows land titles, and declared that

> [E]very original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself.

135 F. at 950. *Williams v. Lee,* 358 U.S. at 223, concerned the extent of state authority in a case where a non-Indian was trading on an Indian reservation. Finally, while *Washington v. Confederated Colville Tribes,* 447 U.S. 134, does contain some language arguably supporting *Montana,* that case applied the *Oliphant* test which the *Montana* Court ignored.

From reading the cases relied upon by *Montana,* it is apparent that all but three involved only questions of state, not tribal, authority, and the three which *did* involve tribal authority upheld it under analysis at variance with *Montana's.* At most, those cases are simply examples of results that would be the same under the *Montana* test. What is most disturbing is the apparent reliance on the "infringement" test of *Williams v. Lee* to determine the extent of tribal, rather than state, authority. The majority apparently used a test designed to *protect* tribal government from extensions of state authority to *restrict* tribal government.

CONCLUSION

Self-government for Indian people is the principle means by which they are able to protect their distinct cultures from being subsumed by the majority culture. Tribal reservations are the last vestige of the vast domain and cultural freedom that Indian people enjoyed prior to European contact. In order for the dominant culture to flourish, Indian people ceded the vast majority of that domain, and agreed to be incorporated into the majority government, but only in return for guarantees of retained territory and self-government. If those retained rights are denied them, then their cultures will perish, and this Nation will have destroyed a source of incalcuable inspiration and enrichment.

The time-honored rules of treaty and statutory construction must be applied in this case to the Yakima Treaty and the rights retained by and guaranteed to the Yakima people under that Treaty. Tribal territory is not defined by land titles, but by boundaries. Indian people's right to choose their own government arises from and is as sacred as the same natural rights held by the people of the states.

> Nations differ from each other in condition, and that of the same nation may change by the revolutions of time, but the principles of justice are the same. They rest upon a base which will remain beyond the endurance of time.

Worcester, 31 U.S. at 583. (McLean, J., concurring.)

Petitioners' reliance upon *Montana* is an attempt to bootstrap themselves into a legal position that has no principled support. The entire *Montana* analysis suffers from

asking the wrong questions, reversing established presumptions, and disregarding controlling precedent. That this Court recognizes the weakness of *Montana's* analysis is suggested by the fact that this Court has never again applied *Montana* in another case.

The Navajo Nation respectfully urges that this Court expressly overrule the *Montana* decision. *Montana* breeds uncertainty and endless litigation. The solution, however, is not to adopt the test based on land tenure classification proposed by Petitioners, but to leave questions of tribal jurisdiction to Congress, where they properly belong. U.S. Const., art. I, sec. 8.

This Court should adopt in this case a rule which requires a clear, plain and unequivocal expression from Congress that it intends to alter the jurisdictional pattern on an Indian reservation before this Court will find such a change to have occurred. Congress is well able to regulate and define the contours of jurisdiction within Indian reservations in a manner which is responsive to local needs. This Court has allowed Congress virtually unlimited authority over Indian nations and their territories. It should now leave to Congress the task of exercising that authority.

For the foregoing reasons, the decision of the Ninth Circuit upholding the Yakima Nation's jurisdiction should

be affirmed with direction to enter judgment in favor of the Yakima Nation.

Respectfully submitted,

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CASE NOS. 87-1622, 87-1697 AND 87-1711

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

PHILLIP BRENDALE, Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, et al., Respondents.

STANLEY WILKINSON, Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, Respondent.

COUNTY OF YAKIMA, et al., Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, Respondent.

BRIEF OF THE GOVERNING COUNCIL OF THE PINOLEVILLE INDIAN COMMUNITY IN SUPPORT OF THE CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION

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41 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii-iv
INTRODUCTION	1
SUMMARY OF ARGUMENT	1
INTEREST OF AMICUS CURIAE	3
A. Factual background	3
B. Statement of Interest	11
ARGUMENT	12
I. THIS COURT HAS ARTICULATED STANDARDS FOR DECIDING WHEN AN INDIAN TRIBE CAN REGULATE NON-INDIAN USE OF FEE LAND LOCATED ON ITS RESERVATION	12
II. THE COURT OF APPEAL PROPERLY APPLIED THESE STANDARDS. THIS COURT SHOULD AFFIRM ITS DECISION	19
A. Congress has not divested Indian tribes of the authority to regulate non-Indian fee owned reservation land	19
B. Comprehensive tribal land use regulation generally promotes the tribe's ability to make its own laws and be ruled by them	24
CONCLUSION	29
APPENDIX I	A-1

TABLE OF AUTHORITIES

Page

CASES:

Camp v. Mendocino County,
123 Cal. App. 3d 334 (1981)..... 5

Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside,
828 F.2d 529 (9th Cir. 1987)..... 10,11

DeCoteau v. District Court,
420 U.S. 427..... 21

Duncan v. Andrus,
517 F. Supp. 1 (N.D. Cal. 1977)... 4

Duncan v. United States,
667 F.2d 36 (Ct. Cls. 1981), cert. denied 463 U.S. 1228 (1983)..... 4

Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926)..... 24,25

Hardwick v. U.S.,
No. C-79-1710 SW
(N.D. Cal. 1979)..... 3

In re Hang Kie,
69 Cal. 149 (1886)..... 25

Lincoln Trust Co. v. Williams Bldg. Corp.,
229 N.Y. 313 (1920)..... 25

Mattz v. Arnett,
412 U.S. 481 (1973)..... 20

Montana v. United States,
450 U.S. 544 (1981)..... Passim

Page

National Farmers Union Ins. Cos. v. Crow Tribe,
471 U.S. 845 (1985)..... 15

New Mexico v. Mescalero Apache Tribe,
462 U.S. 324 (1983)..... 15,18

Oliphant v. Suquamish Indian Tribe,
435 U.S. 1919 (1978)..... 12,16,17

Pinoleville Indian Community v. Mendocino County,
684 F. Supp. 1042, 1044
(N.D. Cal. 1988)..... 3,7,8,9

Seymour v. Superintendent,
368 U.S. 351 (1962)..... 21

Smith v. United States,
515 F. Supp. 56 (N.D. Cal. 1978).. 4

United States v. Wheeler,
435 U.S. 313 (1978)..... 13

White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980)..... 18

Williams v. Lee,
358 U.S. 217 (1959)..... 18

STATUTES:

18 U.S.C. §1151..... 21,22,23

California Rancheria Act, Act of August 18, 1958, Pub. L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, 78 Stat. 390..... 4

Page

General Allotment Act of 1887, 24 Stat. 388..... 20

Indian Reorganization Act, Act of June 18, 1934, c. 576, 48 Stat. 987..... 22

MISC:

Anderson & Roswig, Planning, Zoning & Subdivision: A Summary of Statutory Law in the 50 States (1966)..... 26

Cohens, Handbook of Federal Indian Law (1982 Ed.)..... 23

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INTRODUCTION

The Governing Council of the Pinoleville Indian Community submits this brief in support of the Confederated Tribes and Bands of the Yakima Indian Nation. Pursuant to Rule 36, the Governing Council submits with this brief letters from counsel for Petitioners Wilkinson, Yakima County and Brendale as well as the Yakima Indian Nation which consent to the filing of this brief.

SUMMARY OF ARGUMENT

According to the prior decisions of this Court, to determine whether an Indian tribe can exercise civil regulatory authority over a non-Indian owner of reservation fee land, a court must carefully review the existence of tribal sovereignty by reference to relevant statutes, Executive Branch policy and administrative or judicial decisions.

If these materials fail to demonstrate a divestiture of tribal sovereignty, and the non-Indian activity threatens to have a

direct effect on core tribal interests, the tribe can civilly regulate that activity. If tribal interests in regulating the activity outweigh county interests, the tribal regulation will pre-empt inconsistent county regulations.

The Court of Appeals properly applied these principles in this case.

Comprehensive tribal zoning of all reservation land is not inconsistent with the Indian tribes' dependent status. The General Allotment Act and similar laws did not divest tribes of this authority.

Comprehensive zoning is an essential element of tribal self-government and necessarily affects core tribal interests.

In every county throughout the country cities comprehensively zone within their boundaries, leaving counties to zone the unincorporated areas. Comprehensive tribal zoning within reservation boundaries fits this national pattern.

INTEREST OF AMICUS CURIAE

A. Factual background.

Between 1983 and 1986 the Pinoleville Indian Community was restored as a federally recognized Indian Tribe and the Pinoleville Rancheria[1] as a federally recognized reservation.[2] The 99 acres comprising the reservation were originally purchased by the United States in 1911 pursuant to appropria-

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1. The rancheria is located in Mendocino County, California. Mendocino County is a rural county located approximately 100 miles north of San Francisco in Northern California. The reservation is less than a mile north of the City of Ukiah. It is bordered on the north by Ackerman Creek which is a tributary of the Russian River, and on the south by its sole access road, Pinoleville Drive.

2. The restoration resulted from final judgments entered in Hardwick v. U.S., No C-79-1710 SW (N.D. Cal. 1979) against the United States on December 22, 1983 and March 5, 1986, and against Mendocino County on November 18, 1985. The judgments resulted from stipulations with the parties, approved by the court following a hearing preceded by notice mailed to potential class members and published in the local newspaper. See Pinoleville Indian Community v. Mendocino County, 684 F. Supp. 1042, 1044 (N.D. Cal. 1988).

tions acts passed in 1908. Prior to its restoration the reservation had been terminated under the California Rancheria Act, Act of August 18, 1958, Pub. L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, 78 Stat. 390 [hereafter, "the Rancheria Act"].

As part of its termination the reservation was subdivided into 19 parcels. Deeds to these parcels were conveyed in fee simple to Indians from the reservation.[3] Subsequent parcel splits approved by Mendocino County and conveyances by Indian owners have resulted in the creation of 29 parcels. Of these parcels 14, or 43% of the acreage, remain in Indian ownership. The Indian parcels are scattered throughout the reserva-

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3. For a further description of the termination process under the Rancheria Act see Duncan v. Andrus, 517 F. Supp. 1 (N.D. Cal. 1977); Smith v. United States, 515 F. Supp. 56 (N.D. Cal. 1978); Duncan v. United States, 667 F. 2d 36 (Ct. Cls. 1981), cert. denied 463 U.S. 1228 (1983).

tion.

Zoning began in the unincorporated areas of Mendocino County in 1956, before the reservation was terminated in the early 1960's. Prior to 1979, when the law suit which ultimately restored the reservation was filed, Mendocino County had zoned the reservation lands for agricultural uses. In 1982, while the law suit was pending, the county substantially revised its general plan and zoning ordinance, re-zoning the reservation industrial. See, Camp v. Mendocino County, 123 Cal. App. 3d 334 (1981). Residential uses are not allowed in an industrial zone in Mendocino County, because industrial uses are generally regarded as incompatible with residential use.

In May 1987, a non-member Indian of the reservation applied to the county for a permit to locate a redimix concrete plant and an asphalt batch plant on land located in the virtual middle of the reservation within the

100 year flood plain of Ackerman Creek. Indian owned homes border the parcel and no fence or other obstruction separates the parcels. Pinoleville Drive, a narrow, two lane road, provides the only access to the parcel. Trucks entering or leaving the parcel must pass homes owned by tribal members, some of which are occupied by elderly tribal members. Others are occupied by families with preschool age children.

When it learned of this application, the Governing Council of the Pinoleville Indian Community, formed in March 1985, adopted an ordinance imposing a one-year moratorium on new industrial uses of reservation property. The ordinance was intended to allow the Governing Council time to develop a comprehensive land use plan for the reservation that would harmonize continued residential and agricultural uses of reservation land with some commercial and limited industrial uses. The ordinance was adopted only after

the Governing Council conducted noticed public hearings. The moratorium did not prevent agricultural, residential or commercial uses of reservation land.

The Governing Council also opposed the permit application in hearings before the county zoning administrator and Board of Supervisors. During the hearings the Governing Council argued that the county was required to prepare an Environmental Impact Report under state law before approving the application. The Governing Council's environmental expert had determined that the proposed plants would create vast increases in heavy truck traffic, noise, dust and air pollution and threatened the continued use of Ackerman Creek as a source of fish and water for members of the Pinoleville Indian Community. Pinoleville Indian Community v. Mendocino County, supra, 684 F. Supp. at 1045.

In addition, the Governing Council argued that under the circumstances confront-

ing the Pinoleville Indian Community it had the authority to pass the moratorium ordinance and county approval would violate the ordinance. The county nevertheless approved the application without requiring an Environmental Impact Report. See Pinoleville Indian Community v. Mendocino County, supra, 684 F. Supp. at 1044. In so doing the county found that the industrial plants as approved could not have any significant impact on the environment. The county based this finding, in part, on the industrial zoning for the reservation.

The county reasoned that heavy truck traffic, noise, dust and air and water pollution necessarily accompany industrial development. The county equated the existing zoning of the reservation with the existing environmental conditions on the reservation. The Governing Council pointed out that the industrial zoning classification was inherently incompatible with its efforts to re-

store the reservation as a residential community for its members. The Council argued that over time industrial use of non-Indian property would effectively force tribal members to abandon residential use of their property. Eventually, the conflict between tribal and county land use policies would cause a de facto termination of the Pinoleville Indian Community, even as the tribe struggled to recover from the de jure, though invalid, termination attempted by the federal government.

After the county approved the plants, the Governing Council filed suit in the Federal District Court for the Northern District of California, inter alia, to enjoin the county and the property owner from violating its ordinance. Pinoleville Indian Community v. Mendocino County, supra, 684 F. Supp 1042. On March 19, 1988, the court granted the Governing Council a preliminary injunction against the property owner. In

granting the injunction the court relied primarily on this Court's decision in Montana v. United States, 450 U.S. 544 (1981), and the Court of Appeals decision in Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F. 2d 529 (9th Cir. 1987). Id.

Subsequent to the issuance of the preliminary injunction, the Governing Council approached the county with the suggestion that the parties attempt to resolve the litigation by adopting compatible land use policies. As a result the parties, including the affected property owner, entered into a stipulation staying further proceedings for a one year period, during which the Governing Council and the county will attempt to adopt identical, or, at least, compatible land use policies governing both fee and trust lands on the reservation. A true and correct copy of the stipulation is attached hereto as Appendix 1. Under Montana if the parties adopt

compatible policies, the county zoning will apply to non-Indian fee owners on the reservation and tribal zoning will apply to trust lands.

B. Statement of Interest.

The Governing Council believes that the Yakima decision properly applied the principles articulated in Montana and the other decisions discussed below. As the Governing Council has so recently learned, the consistent application of those principles is absolutely essential in preserving the right of reservation Indians to make their own laws and be ruled by them. This is particularly true of the small reservations throughout California called "rancherias." Without this protection these communities will exist at the whim of the counties in which they are located.

So long as this Court's recently articulated principles of inherent tribal sovereignty continue to apply, Indian tribes

and counties in California can negotiate reasonable solutions to land use issues of mutual concern. With their limited resources, tribes and counties share a mutual interest in resolving these issues without the expense of litigation. The Governing Council's experience illustrates, however, that negotiations on a government-to-government basis will not occur unless the tribe's inherent sovereignty empowers it to regulate non-Indian use of fee land in appropriate circumstances.

ARGUMENT

I. THIS COURT HAS ARTICULATED STANDARDS FOR DECIDING WHEN AN INDIAN TRIBE CAN REGULATE NON-INDIAN USE OF FEE LAND LOCATED ON ITS RESERVATION.

In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), this Court announced that Indian tribes can be dispossessed of aspects of their sovereignty ". . . by implication as a necessary result of their dependent status . . . " as well as by specific

congressional enactment. Oliphant, of course, only specifically held that the Suquamish Tribe's dependent status necessarily deprived it of the sovereign authority to prosecute two non-Indians in tribal court for criminal violations.

In United States v. Wheeler, 435 U.S. 313 (1978), the Court clarified that Indian tribes retain the sovereignty to prosecute tribal members in tribal court for violations of tribal criminal laws. The Court clearly held that this authority derived from retained sovereignty and was not a grant of authority from Congress. Wheeler, supra, at 326, noted that:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe.

In Montana v. United States, 450 U.S. 544, 564 (1981), the Court explained that the "implicit divestiture" doctrine does not

apply to a tribe's internal relations, such as the conduct of tribal members, questions of tribal membership, domestic relations among members, and rules of inheritance for members.

> But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation. [Citations omitted.] (Emphasis added.)

Based on these principles, Montana held that the Crow Tribe had no sovereign or delegated congressional authority to prohibit non-members from hunting on fee land located on the reservation. However, the Montana decision recognized that retained tribal sovereignty could still provide an Indian tribe with authority to regulate non-Indians who enter consensual relations with the tribe or when the conduct of non-Indians on fee lands within the reservation:

> . . . threatens or has some direct effect on the political integrity, the economic security, or the health

or welfare of the tribe. Id. at 566.

The Court found that none of the conditions which might allow the Crow Tribe to regulate non-Indian hunting on fee land had been alleged in that case. The Court did provide some examples of allegations that might justify tribal regulation: 1) non-Indian hunting that imperils the subsistence or welfare of the tribe; 2) an abdication or abuse by the state of its responsibility to protect or manage wildlife; 3) state regulations that impair the right of tribal members to hunt or fish; or 4) less stringent regulation for on-reservation hunting or fishing than for similar activities elsewhere. Id., at 566, fn. 16. See also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331, fn. 12 (1983).

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985), has eliminated any suggestion that implicit divestiture has deprived Indian tribes of all authority to

regulate non-Indians not involved in consensual relations with tribes. In that case the Court specifically held that Oliphant does not automatically prevent an Indian tribal court from exercising civil subject-matter jurisdiction over non-Indians. That case involved a suit brought by a tribal member against a Montana school district based on an occurrence arising on land owned by the state within the boundaries of the reservation.

In remanding the case to the tribal court to determine its own jurisdiction the Court stated:

> Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. Id., at 855-856.

The issue now before this Court is whether the Yakima Indian Nation by act of Congress or by virtue of its dependent status

has been divested of the civil jurisdiction to establish comprehensive land use policies for its entire reservation encompassing all lands within reservation boundaries, including land owned in fee by non-Indians. That question must be answered using the analyses developed by this Court since Oliphant. That is, in the context of the Yakima Indian Nation establishing comprehensive land use policies for its reservation:

1. Does a careful review of tribal sovereignty and relevant statutes, Executive Branch policy and administrative or judicial decisions demonstrate a divestiture of jurisdiction over non-Indians; and

2. Will non-Indian use of fee land on the reservation threaten or have a direct effect on the political integrity, economic security, health or welfare of the tribe? In answering this question a court should examine whether the non-Indian's activities on his land imperil the subsistence or welfare

of the tribe. It should also examine existing state regulations to see whether 1) the state in its regulation has abdicated or abused its responsibility to regulate the non-Indian, 2) the non-Indian activities permitted under applicable state regulations interfere with Indian use of reservation resources, or 3) state regulations are applied on the reservation as rigorously as they are off the reservation.[4]

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4. This case appears to present the Court with a related although analytically distinct question, since both the Yakima Indian Nation and Yakima County seek to regulate the same non-Indian activities. As recently pointed out in New Mexico v. Mescalero Apache Tribe, supra, 462 U.S. at 334, fn. 16:

> The exercise of state authority [even over non-Indians] may also be barred by an independent barrier--inherent tribal sovereignty --if it "unlawfully infringe[s] 'on the right of reservation Indians to make their own laws and be ruled by them.'" White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980), quoting Williams v. Lee, 358 U.S. 217 (1959) [additional citations omitted.]

However, if, after applying the Montana analysis, the Court concludes that the tribe has authority to regulate the non-Indian, it should follow without further analysis that application of the state law would interfere with the right of reservation Indians to make their own laws and be ruled by them.

II. THE COURT OF APPEAL PROPERLY APPLIED THESE STANDARDS. THIS COURT SHOULD AFFIRM ITS DECISION.

The Court of Appeal in the decision below followed this approach. It first determined by reference to relevant statutes and case law that the Yakima Nation had not been divested of its inherent authority to adopt comprehensive zoning laws for the entire reservation, including non-Indian owned fee lands. After determining that the tribe's authority had not been divested, it remanded the case to the district court to determine whether the balance of the interests favors tribal over county regulation.

The Court of Appeals' conclusions and disposition of this case were correct.

A. Congress has not divested Indian tribes of the authority to regulate non-Indian fee owned reservation land.

Nothing in the relevant statutes, Executive branch policy or legislative or judicial decisions reveals an intent or understanding that the allotment of a reservation divests an Indian tribe of jurisdiction to regulate non-Indian use of fee owned property, where that use has a direct affect on the ability of the tribe to regulate its own internal affairs.

Congress did not understand that the General Allotment Act of 1887, 24 Stat 388, so divested tribes of this authority. On the contrary, this Court has repeatedly held that the policy of the Act " . . . was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished." Mattz v. Arnett, 412 U.S. 481, 496 (1973).

This congressional understanding is further buttressed by the definition of "Indian Country" in 18 U.S.C. §1151, which includes ". . . all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, . . . " Id., at 504. In Seymour v. Superintendent, 368 U.S. 351, 358 (1962) this Court specifically held that 18 U.S.C. §1151 includes within the definition of "Indian Country" reservation land patented in fee to a non-Indian. And in DeCoteau v. District Court, 420 U.S. 427, fn. 2, this Court further explained that:

> If the lands in question [non-Indian owned fee lands] are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government "not withstanding the issuance of any patent, [such jurisdiction] including rights-of-way running through the reservation." 18 U.S.C. §1151(a) ... While §1151 is concerned, on its face, only with criminal jurisdiction, the court has recognized that it generally applies as well to questions of civil jurisdiction. [citations omitted.]

Of course, the allotment policy was

repudiated in the Indian Reorganization Act, Act of June 18, 1934, c. 576, 48 Stat. 987. However, if Congress intended the reservations to continue until the Allotment Act fulfilled its promise of assimilating the Indian residents into the dominant white society, the question remains whether Congress would have intended to deprive Indian tribes of any ability to regulate the non-Indians moving onto the reservations during the transition period. 18 U.S.C. §1151 and this Court's decisions interpreting that statute as well as numerous allotment acts demonstrate that it did not.

While it may defy common sense to suppose that Congress intended that such non-Indians automatically became subject to tribal jurisdiction, see Montana v. United States, supra, 450 U.S. at 560, fn 9, it is equally nonsensical to suppose that Congress intended to prevent tribes from regulating such non-Indian conduct, if regulation is

necessary to protect the tribe's ability to govern its own members; not only nonsensical but directly contrary to 18 U.S.C. §1151 and the decisions of this Court.

The Executive branch likewise has consistently understood that the allotting of land in severalty and the granting of citizenship has not destroyed the tribal relationship or the tribe's authority to regulate within the entire reservation notwithstanding the issuance of fee patents to Indians or non-Indians. See Opinions of the Solicitor, Dept. Of Interior, Vol 1, 55 I.D. 14 (Oct. 25, 1934), p. 445, 454, 466. See also Cohens, Handbook of Federal Indian Law (1982 Ed.) p. 254, citing Attorney General and Solicitor's Opinions dating from 1855.

Accordingly, the Montana test is fully compatible with the judicial and administrative interpretation of the effect of the General Allotment Act, and later acts patterned after the General Allotment Act. As

long as the reservations continue to exist the tribes resident thereon continue to exercise their inherent sovereignty within the limits established by this Court.

B. **Comprehensive tribal land use regulation generally promotes the tribe's ability to make its own laws and be ruled by them.**

The Court of Appeals was also correct in concluding that comprehensive zoning of its reservation necessarily affects a tribe's ability to govern its own members. The Governing Council's experience illustrates that if county land use policies are sufficiently hostile to the preservation of an Indian community, the power to zone non-Indian property may be necessary to protect the very existence of that community. But even where the conflicts are much less intense, comprehensive regulation within a defined geographical area is the sin qua non of zoning. See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Zoning within municipal boundaries in the United States began in the late 1800's. As early as 1899, Congress enacted height zones for Washington, D.C. 30 Stat. 922. In re Hang Kie 69 Cal. 149, 10 P. 327 (1886) upheld a City of Modesto, California, ordinance prohibiting public laundries except within a defined area of the city. New York City adopted the first modern, comprehensive zoning ordinance in 1916. See Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920). However, this Court did not uphold the constitutionality of comprehensive zoning until Euclid, supra, in 1926.

Comprehensiveness became the standard for modern zoning ordinances, when the Department of Commerce developed the Standard State Zoning Enabling Act (1926). Reprinted in 3 Ruthtcopf, The Law of Zoning and Planning 100 (3d Ed. 1967). All 50 states have since adopted such acts for municipalities,

but only 37 have enabled counties to zone. See Anderson & Roswig, Planning Zoning & Subdivision: A Summary of Statutory Law in the 50 States (1966); Cunningham, Land-Use Control - The State and Local Program, 50 Iowa L. Rev. 367, 369, n. 3 (1965).

Thus, comprehensive zoning within municipal boundaries has developed as the pattern in modern land use regulation and in 37 of 50 states counties zone within their unincorporated areas. Consequently, counties are accustomed to local general purpose governments within their boundaries developing separate zoning ordinances. Tribal zoning within entire reservations fits this historical development of zoning within the United States. County zoning of non-Indian fee owned lands within reservation boundaries, on the other hand, is contrary to this historical development, and frustrates the very purpose of comprehensive zoning.

As envisioned by the Standard Act a

zoning ordinance establishes zones or districts designated as usable primarily for defined purposes. The provisions in each zone had to be uniform throughout the zone. Standard Act §2. While variations within zones are allowed through the use of variances and use permits, the primary objective remains grouping compatible uses together.

If a county, for example, could zone every third parcel in each block of a city located in the county, certainly such a practice would undermine comprehensive municipal zoning. Similarly, if a county can reach into the heart of an Indian reservation and authorize uses on non-Indian fee lands that are incompatible with uses of adjacent tribal land authorized by a tribal zoning ordinance, the result will disrupt tribal zoning.[5]

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5. Many of the amici in support of the County of Yakima suggest that it violates due process or is, at least, unfair to subject non-Indians to any form of tribal regulation, because as non-members they cannot vote in

As the history of zoning in Yakima and Mendocino counties demonstrates, both tribal and county zoning are relatively recent developments. For this reason, non-Indian fee owners of reservation land cannot legitimately claim that tradition dictates the application of county zoning laws to their property. In the absence of any clear congressional intent to divest tribes of such authority, the Court of Appeal's remand to have the district court balance the respective interests of the federal and tribal governments, on the one side, and the county government, on the other, was the proper disposition.

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tribal elections and directly influence the content of these regulations. However, property owners are frequently subject to land use regulation by jurisdictions in which they are not voters. This circumstance is not unique to Indian reservations. The right to vote generally depends on residence, not property ownership. Accordingly, counties frequently regulate through zoning property owned by non-residents, who have no voice in county elections. Amici simply cannot tie the right to regulate to the right to vote.

Contrary to the arguments advanced by amici in support of Yakima County, the Court of Appeal's disposition properly respects this Court's pronouncements in Montana, supra. The decision simply recognizes that in the unique field of land use regulation a tribal decision to include non-Indian fee owned reservation land in a comprehensive tribal zoning ordinance rests upon the tribe's need to make its own laws and be ruled by them.

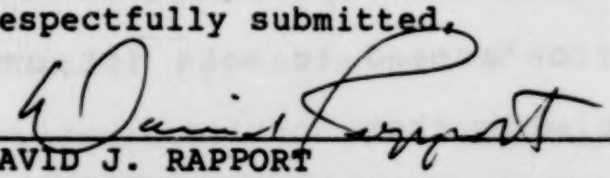
CONCLUSION

The Yakima Indian Nation retains its sovereign authority to zone its reservation. That authority necessarily extends to both trust and fee land located on the reservation. The exercise of that authority is not inconsistent with the Yakima Nation's dependent status. In fact, its ability to coordinate the use of reservation land lies at the heart of reservation self-government. Congress has not divested the tribe of this

authority.

As the Governing Council has learned county and tribal governments can accommodate their mutual interests in land use regulation through negotiation. But this will not happen unless this Court upholds the tribe's sovereign status and its authority to regulate fee lands in appropriate circumstances.

Respectfully submitted,



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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Governing Council of Pinoleville Indian Community Plaintiff, v. Mendocino County, Board of Supervisors of Mendocino County; Ross Mayfield, Brent Mayfield, Defendants.	NO. C-87-4320 EFL STIPULATION AND ORDER

It is hereby stipulated by and between the parties to the above-entitled action through their respective attorneys of record as follows.

1. The existing preliminary injunction enjoining the Mayfield defendants from operating any concrete plant or any asphalt plant shall remain in effect for one (1) year, unless the Mayfield defendants obtain from plaintiff a hardship exemption as to either one or both of such plant operations.

2. Prior to July 1, 1988, the County shall consider adopting an interim ordinance effective immediately upon adoption that prohibits for a one-year period any issuance of any approval for

any industrial use within the existing boundaries of plaintiff's Rancheria. In the event the County fails to adopt such an ordinance prior to July 1, 1988, this Stipulation shall be null and void and of no further force or effect.

3. With the assistance of County plaintiff shall present to defendant County for implementation plaintiff's proposed amendment to that part of defendant County's General Plan which applies within the existing boundaries of plaintiff's Rancheria. Such proposed amendment shall be sufficiently detailed to allow defendant County to determine the appropriateness of compatible land use policies and zoning requirements within the existing boundaries of plaintiff's Rancheria. Defendant County and plaintiff shall cooperate to initiate and timely process such proposed amendment. Defendant County shall waive all fees associated with processing such amendment, including implementing zoning requirements.

4. Except for plaintiff's ordinance currently in effect strictly prohibiting new industrial uses within its boundaries, plaintiff shall adopt no zoning ordinance or any other land use regulation prior to or during the period of the County interim ordinance described in paragraph 2 of this Stipulation.

5. The parties stipulate to a stay of further proceedings in this court, pending defendant County's adoption of amendments to the County General Plan and implementing zoning laws satisfactory to plaintiff. Such stay of further proceedings shall remain in effect for a one-year period commencing July 1, 1988, or until the above-referenced County General Plan Amendment is adopted, whichever occurs first.

6. Issues raised in the instant complaint as to the effect of the stipulated judgment in Hardwick v. United States et al., No. C-79-1710 SW (N.D.Cal. 1979), and plaintiff's CEQA claims shall be reserved for further proceedings in this court.

7. If the County adopts the interim ordinance described in paragraph 2 of the stipulation, plaintiff shall waive its claims to attorney's fees incurred to date and to civil penalties for past violations under its Ordinance No. 2.

8. If the County adopts the interim ordinance described in paragraph 2 of this Stipulation, defendant County shall pay plaintiff its costs of litigation incurred as of the date of this Stipulation which plaintiff estimates at this time to equal the sum of $1,330.71, including expert witness fees. County shall pay said costs within thirty (30) days after plaintiff submits its cost bill to the County.

9. If the stay of further proceedings is terminated by the County's adoption of amendments to the County General Plan satisfactory to plaintiff, the parties agree as follows:

(a) Plaintiff shall dismiss Mendocino County from the pending litigation;

(b) Defendant County and defendant Mayfields shall dismiss any pending appeal of the instant preliminary injunction.

(c) Plaintiff shall waive any claim for attorney's fees incurred subsequent to the date of this Stipulation, reserving the right to claim such fees if the County fails to adopt the above referenced General Plan Amendment and implementing zoning requirements.

(d) The Mayfields shall stipulate to comply with the Tribal

land use plan, provided said plan allows the Mayfields to continue uses to the extent the Tribe has authorized said uses under the hardship exemption provisions of Ordinance No. 2 in effect before adoption of said plan.

The parties reserve the right to request an additional stay if at the end of the one-year period they believe completion of a satisfactory General Plan Amendment will occur within a reasonable time.

DATED: 6/6/88

MENDOCINO COUNTY
H. PETER KLEIN, County Counsel

BY: _____
YVES A. HEBERT
Deputy County Counsel
Attorneys for Defendants
County of Mendocino and
Board of Supervisors of
County of Mendocino

DATED: 6-6-88

GOVERNING COUNCIL OF PINOLEVILLE INDIAN COMMUNITY

BY: _____
DAVID J. RAPPORT
Attorney for Plaintiff

DATED: 6-7-88

ROSS AND BRENT MAYFIELD

BY: _____
NANCY BIGGINS
Attorney for Defendants
Ross Mayfield and
Brent Mayfield

ORDER

Having read the foregoing Stipulation and good cause appearing therefor,

IT IS SO ORDERED.

DATED: JUN 2 0 1988

_____
JUDGE of the United States
District Court

CERTIFICATE OF SERVICE

I, David Rapport, being first duly sworn deposes and says:

1. I am a member of the Bar of this Court and represent the Governing Council of the Pinoleville Indian Community.

2. I have served copies of Brief of the Governing Council of the Pinoleville Indian Community in Support of the Confederated Tribes and Bands of the Yakima Indian Nation on all parties of record herein as follows:

On November 4, 1988, I deposited a true copy of said document in a sealed envelope with the correct postage thereon fully prepared in the United States Post Office mailbox at Ukiah, California, addressed to each attorney of record herein as follows:

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ACKNOWLEDGMENT

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On NOVEMBER 4, 1988, before me, the undersigned a Notary Public in and for said State, personally appeared DAVID J. RAPPORT known to me to be the person whose name is subscribed to the within instrument, and severally acknowledged to me that he executed the same.

Witness my hand and official seal.

_____
Notary Public in and for said State

OFFICIAL SEAL
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Notary Public-California
MENDOCINO COUNTY
My Comm. Exp. Sep. 10, 1991

(21) (20) (21)

Nos. 87-1622, 87-1697, and 87-1711

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In The

Supreme Court of the United States

October Term, 1988

PHILIP BRENDALE,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,

v.

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COUNTY OF YAKIMA, *et al.*,
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CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE SWINOMISH TRIBAL COMMUNITY, et al., (additional amici listed inside) IN SUPPORT OF RESPONDENTS

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Confederated Salish & Kootenai Tribes of the Flathead Reservation;
Kalispel Indian Tribe;
Lummi Indian Tribe;
Native Village of Venetie;
Northern Arapaho Tribe of the Wind River Reservation;
Rosebud Sioux Tribe;
Shoshone-Bannock Tribes of the Fort Hall Reservation;
Shoshone Indian Tribe of the Wind River Reservation;
Spokane Tribe of Indians; and
Association on American Indian Affairs

TABLE OF AUTHORITIES

Page(s)

CASES

Buster v. Wright, 135 F. 947 (8th Cir. 1905) 11

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 6, 7, 12, 14, 16

Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987) 13, 17

Dodge v. Nakai, 298 F.Supp. 17 (D. Ariz. 1969) 8

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 9

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 6, 7, 8, 10

Kelly v. Washington, 302 U.S. 1 (1937) 9

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 11, 12

Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) 6, 9

Montana v. United States, 450 U.S. 544 (1981) 4, 5, 6, 11, 17

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) 7, 8, 11

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 12, 13, 14, 16

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 11

Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) 17

Rice v. Rehner, 463 U.S. 713 (1983) 17

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) 18

Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976) 8

United States v. Mazurie, 419 U.S. 544 (1975) 9

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 10, 15

Williams v. Lee, 358 U.S. 217 (1959) 8, 9, 12

STATUTES

5 U.S.C. §§ 551-559 8

18 U.S.C. § 1151 7

25 U.S.C. § 331-358 5

25 U.S.C. §§ 461-462 6

25 U.S.C. §§ 1301-1303 8

25 U.S.C. § 1302(8) 8

33 U.S.C. § 1377 6

42 U.S.C. § 300f 7

42 U.S.C. § 7474(c) 7

42 U.S.C. § 9626 7

OTHER AUTHORITIES

133 Cong. Rec. S733-02 6

5 Fort Hall Land Use Operative Policy Guidelines § 7 (1979) 8

Article VIII, Constitution of the Lummi Indian Tribe 8

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BRIEF AMICI CURIAE OF THE SWINOMISH TRIBAL COMMUNITY, et al., IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

Amici curiae are thirteen (13) federally-recognized Indian tribes and one (1) national Indian-interest organization.[1] Amici have a substantial interest in the issues raised

[1]Counsel for Petitioners and counsel for Respondents have consented to the filing of the brief of amici in support of Respondents. The consents are submitted for filing herewith.

in this case. The issues involve the scope of tribal authority to zone and regulate land use on non-member fee lands within Indian reservations as defined by federal law.

The Association on American Indian Affairs is a national, non-profit organization dedicated to protecting the rights and improving the welfare of American Indian and Alaska Native communities.[2] Several amici tribes currently exercise zoning or land use jurisdiction over non-member fee lands within their reservations. Other amici tribes exercise other forms of civil regulatory authority over such lands. All amici urge this Court to hold that Indian tribes have exclusive authority to zone and regulate land use on non-member fee lands within their reservations.

On most Indian reservations, the presence of non-members and fee lands are everyday facts of life. Amici do not deny that non-members have rights on Indian reservations, including important rights tied to use of their land. But the exclusive authority of Indian tribal governments to regulate the zoning and land use of non-member fee lands is crucial, especially where, as in this case, critical Indian interests are involved. Without such authority, Indian tribes cannot adequately preserve, protect, and perpetuate the rights and resources under federal law and tribal law of all people on Indian reservations.

—o—

SUMMARY OF ARGUMENT

Petitioners argue that the County of Yakima has exclusive authority to zone and regulate land use on non-

[2]The Association on American Indian Affairs was founded in 1922. It is the largest Indian-interest organization in the country, with a membership of about 14,400 individuals, Indian and non-Indian.

member fee lands within the Yakima Indian Reservation. They rely largely on this Court's opinion in *Montana v. United States*. In Part I of this brief, amici show three independent reasons that this argument should be rejected and tribal authority over the lands should be upheld. In Part II, amici show that tribal authority is exclusive because the tribal interests and federal interests in tribal zoning and land use regulation on non-member fee lands override any interests that the state and county have shown in zoning those lands within the reservation.

As interpreted by this Court in *Montana*, the General Allotment Act did not absolutely divest Indian tribes of their authority over allotted lands. In *Montana*, this Court established a rebuttable presumption that if a tribe could demonstrate that activities on the allotted lands affected a tribe's ability to protect self-government, then the presumption in favor of no tribal authority over those lands would be overcome. This rebuttable presumption test set out by the Court in *Montana* did not fully examine the repudiation of the Allotment Act nor fully consider it in the context of modern federal Indian law and policy.

Second, and alternatively, the holding of *Montana* should be limited to those situations where the tribal regulation treats non-members disparately from members. The facts presented to the Court in *Montana* involved tribal prohibition of non-members hunting and fishing on non-member fee lands within the reservation. But where, as here, the tribal regulation treats members and non-members equally, the rebuttable presumption test should not be applied.

Third, and alternatively, should this Court decide not to limit *Montana*, the Court should find that the tribal

regulatory interest in this case comports with the holding in *Montana*. Zoning by the County of non-member fee lands directly affects the political integrity, economic security, and the health and welfare of the Tribe.

Tribal authority to zone non-member fee lands is exclusive because the authority of the County to zone concurrently these lands is preempted by federal law. Preemption exists in part by virtue of the fact that county zoning would infringe on the self-governing authority of the Tribe to make its own laws. In addition, concurrent tribal and state zoning and land use authority is inherently unworkable. Finally, because the interest of the Tribe in exercising exclusive zoning and land use authority on non-member fee lands within the reservation boundaries is so necessary to direct the method for development of the Reservation, the proffered interest of the County in this case is secondary to that of the Tribe.

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ARGUMENT

I. TRIBES HAVE AUTHORITY TO ZONE NON-MEMBER FEE LANDS WITHIN A RESERVATION.

The Yakima Indian Nation (Tribe) regulates through zoning and land use regulation its entire reservation, including land owned in fee by non-members. In this case, Petitioners claim that the County of Yakima (County) has exclusive zoning authority over the non-member fee lands within the reservation. The Tribal zoning scheme and the County scheme are in direct conflict. Resolution of this case presents an opportunity to revisit the issues raised in the case of *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*), particularly in light of federal Indian policy favoring tribal self-determination, and recent deci-

sions of this Court regarding tribal jurisdiction over non-Indians on the reservation.

In *Montana*, the Crow Tribe tried to prohibit non-members from hunting and fishing on non-member fee lands within the Crow Indian Reservation. Its authority to do so was denied. The Court held that neither the Crow Treaties nor inherent tribal sovereignty supported the Tribe's exercise of regulatory authority in that case. *Montana*, 450 U.S. at 557-567. Petitioners ask this Court to apply *Montana* to deny the Tribe's authority to zone and regulate land use on non-member fee lands within the Yakima Reservation. For three independent reasons, *Montana* should not be so applied.

A. Federal Law And Policy Favoring Tribal Self-Determination Require That This Court Re-evaluate Montana.

Petitioners, and some amici in support of Petitioners, argue that this case should be resolved in accordance with this Court's intimation in *Montana*, that tribal authority over allotted (fee) lands has been limited by federal law. This argument is premised on the Court's footnote in *Montana* which suggested the General Allotment Act of 1887, 25 U.S.C. §§ 331-358, as a source of non-member land rights in that case. *Montana*, 450 U.S. at 559 n.9. Petitioner's argument essentially asks this Court to find that *Montana* did not go far enough and that the General Allotment Act does not simply limit tribal authority over non-member fee lands, but completely divests it. Petitioners thus would close the door left open in *Montana* for the exercise of tribal authority over non-member fee lands, *i.e.*, the tribal interest test. That test establishes a rebutable presumption that tribes lack regulatory authority unless the tribe bears the burden of showing a sufficient

tribal interest to sustain regulation of non-member fee lands. *See Montana*, 450 U.S. at 565-566.

Amici submit that the *Montana* presumption favoring non-members should be erased by this Court. Even if the General Allotment Act originally created a rebuttable presumption against tribal authority over allotted lands, such presumption has been eradicated by modern federal Indian law and policy. As this Court has held, the policy of allotment was repudiated by the passage of the Indian Reorganization Act, 25 U.S.C. §§ 461-462. *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 478-479 (1976) (*Moe*); *see also Montana*, 450 U.S. at 559 n.9 ("the policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act"). The current federal Indian policy is to actively encourage tribal self-government and economic self-sufficiency. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (*LaPlante*); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (*Cabazon*). To further this policy, several recent statutes in the area of environmental law expressly confirm tribal regulatory authority over all types of land within reservations, including non-member fee lands. *See, e.g.*, the Clean Water Act of 1987, 33 U.S.C. § 1377;[3] the Safe Drinking Water Act, 42 U.S.C. § 300f; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9626 (Superfund); and the Clean Air Act, 42 U.S.C. § 7474(c).

[3]The legislative history of the Clean Water Act indicates that Congress expressly considered tribal authority over non-member fee lands as a necessary aspect of tribal sovereignty. A memorandum describing the Indian provisions stated: "A. Indian tribes are self-governing, exercising limited powers of inherent sovereignty within their reservations. B. *In the exercise of that power, Indian tribes have the right to regulate lands and other natural resources within the reservation, including non-Indian owned fee lands or resources.*" 133 Cong.Rec. S733-02 (1987) (emphasis added).

The opinion in *Montana* did not adequately analyze or give proper weight to legislation enacted after the General Allotment Act, such as the Indian Reorganization Act and the Indian Country Act, 18 U.S.C. § 1151.[4] This case presents an opportunity to correct this omission, especially in light of recent laws which reflect a clear federal policy of across-the-board tribal control within reservations. When the General Allotment Act is read *in pari materia* with the Indian Reorganization Act and the Indian Country Act, congressional intent that tribal powers extend to fee lands within a reservation is unmistakable. The recent environmental laws, passed after *Montana*, evidence congressional intent to recognize continuing tribal jurisdiction over non-member fee lands within the reservation.[5] Moreover, decisions in the tribal regulatory area such as *Montana* are in conflict with recent pronouncements by this Court in the area of tribal adjudicatory authority. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and *LaPlante*, 480 U.S. at 13-18, speak of reservation-wide tests for adjudicatory authority. This

[4]This Act expressly provides that fee lands within Indian reservations are Indian Country. 18 U.S.C. § 1151(a). This Court has held that for purposes of tribal jurisdiction this definition of Indian Country is applicable in civil cases as well as in the criminal context. *Cabazon*, 480 U.S. at 207 n5.

[5]Contrary to the arguments of some amici in support of Petitioners, *e.g.*, Brief of the States of Arizona, et al., at 23-24 & n.16, the express provisions for tribal regulatory authority in these statutes do not mean that absent such express provisions, tribes generally lack such authority. Rather, the provisions represent an effort by Congress to preempt statutorily an area of law, while at the same time recognizing inherent tribal sovereign powers.

case presents an opportunity to bring the regulatory area in line with the adjudicatory cases.

The existence of such uniform tribal powers does not deprive non-members of any cognizable rights. Congress, of course, has addressed the rights of individuals who are subject to tribal governmental authority in the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. *See Dodge v. Nakai,* 298 F.Supp. 17, 24 (D. Ariz. 1969) (the term "any person" in 25 U.S.C. § 1302(8) applies to non-members). Some tribal constitutions extend non-members bill of rights provisions, *e.g.,* equal protection, due process. *See, e.g., Tom v. Sutton,* 533 F.2d 1101, 1105 (9th Cir. 1976) (art. VIII, Const. of the Lummi Indian Tribe). In addition, as a general course of conduct, tribal laws contain provisons patterned after the Administrative Procedure Act, 5 U.S.C. §§ 551-559, under which notice of pending regulations is given (including to non-members) and hearings are held (open to non-members) before and after tribal laws are enacted or amended. *See, e.g.,* 5 Fort Hall Land Use Operative Policy Guidelines § 7 (1979). Although not required for all tribes, many tribal zoning and land use regulations are federally-approved. Some tribes, *e.g.,* the Confederated Salish and Kootenai Tribes, the Shoshone-Bannock Tribes, and the Lummi Indian Tribe, have established regulatory bodies on which non-members have permanent positions as a matter of tribal law. Finally, the integrity of the tribal dispute resolution forums in which claims challenging tribal authority must be brought has been increasingly recognized by this Court. *See Williams v. Lee,* 358 U.S. 217, 223 (1959); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978); *National Farmers,* 471 U.S. at 855-857; *LaPlante,* 480 U.S. at 13-14.

Moreover, this Court has previously rejected the argument of lack of enfranchisement as constituting grounds for invalidating a tribal regulation. In *United States v. Mazurie,* 419 U.S. 544 (1975), Justice Rehnquist, writing for the Court, stated that the argument of a denial of equal protection and due process in the context of non-membership in a tribe was disposed of in *Williams v. Lee,* 358 U.S. at 223. *United States v. Mazurie,* 419 U.S. at 557-558; *see also Moe,* 425 U.S. at 479-80. And when non-Indian governments, *i.e.,* states or their political subdivisions, zone land within their geographic boundaries, there is no requirement that the owner of land be a member of the body politic of that jurisdiction.

B. Second, And Alternatively, Montana Should Be Limited To Cases Where Tribal Regulation Treats Non-Members Differently Than Members, And Such Is Not The Case Here.

It is significant that in *Montana,* the tribal regulation sought to prohibit *only* non-members from hunting and fishing on their lands. Such is not the case here and therefore *Montana* does not apply. The Yakima Tribe's zoning and land use regulations treat members and non-members alike. Amici submit that in such cases, where the tribal regulation is "even-handed," the test for tribal regulatory jurisdiction should presume in the first instance that tribes have jurisdiction. For instance, in non-Indian law cases, when states and their political subdivisions exercise their legitimate police power and regulate on behalf of their citizens, the validity of such regulation is presumed. *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 442-443 (1960); *Kelly v. Washington,* 302 U.S. 1, 10 (1937). Therefore, the concern expressed in *Montana* about abuses of tribal power or disparate treat-

ment by tribes is addressed when members are included among those regulated.

In cases where the tribal regulation treats members and non-members alike, the rights of non-members are protected by the Indian Civil Rights Act, by tribal law, and by access to the tribal courts. *See supra* p. 8. In addition, the rights of non-members are protected in such cases because any perceived abuses or injustice caused by the regulation will also fall on tribal members and most likely will be corrected by them through the normal political processes. Moreover, tribes are cognizant of Congress' plenary authority over them and the ability of Congress to limit tribal jurisdiction if they do not act in a fair and responsible manner. Therefore, in instances of even-handed tribal regulation, the non-member, like the member, should bear the burden of establishing a lack of tribal authority. The non-member must show either divestment by a specific federal statute or treaty provision, *cf. LaPlante*, 480 U.S. at 17-18 (tribal civil adjudicatory jurisdiction over actions involving non-Indians on the reservation "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute"), or that the exercise of tribal authority would be inconsistent with "overriding interests of the National Government." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (*Colville*).

Neither of these showings have been made in this case. Petitioners have failed to show specific divestment of tribal authority, because, contrary to their arguments and those of their amici, *Montana* did not hold that the General Allotment Act specifically divested tribes of all regulatory jurisdiction over allotted lands. *Montana* expressly

recognized that Indian tribes "*retain* inherent sovereign power" to regulate non-members *on fee lands* within a reservation in cases where the non-member enters a consensual relationship with the tribe or its members, or where the non-member's conduct directly affects the political integrity, the economic security, or the health and welfare of the tribe. *Montana*, 450 U.S. at 565-566 (emphasis added). *See also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142-143 (1982) (*Merrion*), *citing with approval Buster v. Wright*, 135 F. 947, 952 (8th Cir. 1905) (Indian tribes retain power to tax non-Indians within the reservation notwithstanding non-Indian ownership of deeded land and the creation of non-Indian local governments). The clear implication is that any issue of specific divestment by the General Allotment Act has been resolved in favor of Indian tribes.

Nor have Petitioners shown that the exercise of tribal zoning is inconsistent with overriding federal interests. The interests that triggered the limits on tribal criminal jurisdiction in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), do not apply to the civil area. *See Montana*, 450 U.S. at 565-566; *National Farmers*, 471 U.S. at 854-856; *LaPlante*, 480 U.S. at 13-14. Congress has never expressed any overriding interests with which tribal authority over non-member fee lands is inconsistent, and in fact has recently approved such authority in several environmental regulation laws. *See supra* p. 6-7. There is nothing exclusively federal about zoning and land use regulation and therefore the exercise of tribal jurisdiction in such matters does not in the least bit threaten federal interests. States and their political subdivisions are generally permitted to zone and regulate land use within their

exterior boundaries. Petitioners show no federal interest that prohibits or limits tribal authority to do so as well.

C. Third, And Alternatively, The Yakima Tribe Has Demonstrated A Tribal Interest Which Would Sustain Its Authority Under Montana.

Amici maintain that this Court should acknowledge that *Montana* is incompatible with modern federal Indian law and policy, or alternatively, that *Montana* should be limited to cases in which the tribal regulation treats non-members differently than members. However, assuming that *Montana* remains unmodified, amici will show below that the tribal interest in zoning and land use regulation is sufficient to sustain tribal authority under *Montana.*

The Tribe's fundamental interest is in exercising "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee,* 358 U.S. at 220. This right of self-government includes the right to regulate matters affecting tribal members or matters arising within tribal territory. *Cabazon,* 480 U.S. at 206-207; *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 331-333 (1983) (*Mescalero Apache*); *Merrion,* 455 U.S. at 136-149; *Colville,* 447 U.S. at 152-154; *Moe,* 425 U.S. at 474-480. The Tribe also has an interest in exercising its right to condition the presence of non-members on the reservation upon submission to tribal laws. *See Mescalero Apache,* 462 U.S. at 333.

Plainly, non-members' development or use of land directly affects the political integrity, economic security, and the health and welfare of the Tribe. As the court below found, "[z]oning, in particular, traditionally has been considered an appropriate exercise of the police power of

a local government, precisely because it is designed to promote the health and welfare of its citizens. . . . Tribal zoning is particularly important because of the unique relationship of Indians to their lands." *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside,* 828 F.2d 529, 534 (9th Cir. 1987) (citations omitted) (*Whiteside*). Zoning and land use regulation are essential means of protecting resources and the environment while at the same time permitting controlled growth and improving the economy.

In *Montana,* this Court was unable to determine a tribal interest in prohibiting non-members from hunting and fishing on fee lands.[6] In contrast, the tribal interest in regulating zoning and land use on non-member fee lands is readily apparent and well-supported by federal law and policy. This Court should affirm the decision below that the Yakima Nation has satisfied the *Montana* direct effect test to support its exercise of zoning authority over non-member fee lands.

II. TRIBAL AUTHORITY IS EXCLUSIVE.

A. County Authority On Fee Lands Is Preempted By Federal Law, And It Would Impermissibly Infringe On Tribal Self-Government.

As a corollary of the plenary federal authority over Indian tribes, and in recognition of the sovereignty re-

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[6] "The Court stressed that in Montana the pleadings 'did not allege that non-Indian hunting and fishing on [non-Indian] reservation lands [had] impaired [the Tribe's reserved hunting and fishing privileges]' . . ., or 'that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe,' . . . and that the existing record failed to suggest 'that such non-Indian hunting and fishing . . . threaten the Tribe's political or economic security.'" *Mescalero Apache,* 462 U.S. at 331 n.12 (brackets in original; citations omitted).

tained by Indian tribes even after formation of the United States, state regulation generally does not extend to Indian reservations. *See Cabazon,* 480 U.S. at 214-217 & n.18. States may exercise concurrent jurisdiction over non-Indians on the reservation "only if not pre-empted by the operation of federal law," and if the state action does not infringe on the "right of reservation Indians to make their own laws and be ruled by them." *Mescalero Apache,* 462 U.S. at 332-333. Here, the Tribe is exercising its rights of self-government—confirmed in federal law—by regulating through zoning and land use regulation. The Tribe has determined to control adverse commercial development and subdivision density while at the same time allowing for compatible residential and commercial growth. This action of the Tribe is most consistent with the notion that reservations were established as tribal homelands, "insulated . . . by a 'historic immunity from state and local control,' " *Mescalero Apache,* 462 U.S. at 332, while at the same time it recognizes the rights of non-Indians who have chosen freely to move onto those homelands.

Plainly, state or county authority to zone and regulate land use on non-member fee lands within reservations is preempted or would infringe on the right of the Tribe to make its own laws. State jurisdiction would interfere with federal and tribal interests, including traditional notions of Indian sovereignty and the congressional goal of Indian self-government, especially the overriding goal of encouraging tribal self-sufficiency and economic development. *See Cabazon,* 480 U.S. at 216-217. The County zoning and land use regulations would permit development that the Tribe's would not, thereby devastating tribal efforts.

Where the tribal and state or county regulation conflict, to allow the state or the county to zone non-member fee lands would create for the landowner an impossible compliance situation. This is unlike the situation where a tax is imposed on a property owner by more than one jurisdiction wherein the only burden on the taxpayer is that of having to pay more than one tax. *See, e.g., Colville,* 447 U.S. at 154-159 (upholding dual tribal and state taxation). The dual compliance problem of conflicting zoning regulations where the tribe and the state or county governments are involved is also not akin to those instances of multi-jurisdictional zoning in the non-Indian law context. Those types of situations typically trace their zoning authority to a single sovereign: the state. Tribes and state governments are separate sovereigns and do not answer to one another for their governmental powers; thus reconciliation of conflicting zoning regulations cannot be accomplished by having the authorizing sovereign resolve the dilemma.

This Court has recognized this problem in a regulatory context. In *Mescalero Apache,* a case very similar to this, in which the State of New Mexico sought concurrent authority over hunting and fishing by non-members on the reservation, this Court stated:

> It is important to emphasize that concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation. Concurrent jurisdiction would empower New Mexico wholly to supplant tribal regulations. The State would be able to dictate the terms on which nonmembers are permitted to utilize the reservation's resources. The Tribe would thus exercise its authority over the reservation only at the sufferance of the State. The tribal authority to regulate hunting and fishing by nonmembers, which has been repeatedly

> confirmed by federal treaties and laws and which we explicitly recognized in Montana v. United States, supra, would have a rather hollow ring if tribal authority amounted to no more than this.

Mescalero Apache, 462 U.S. at 338. The reasoning in *Mescalero Apache* is fully applicable here. As in that case, the exercise of concurrent state jurisdiction in this case would completely "disturb and disarrange" the established tribal regulatory scheme.

B. While A Showing Of Significant Off-Reservation Impacts Might Justify Concurrent Jurisdiction, There Has Been No Such Showing In This Case, And In Any Event, The Tribe's Interests Are Compelling.

Several decisions of this Court have permitted the assertion of concurrent state jurisdiction over activities and areas, not involving land ownership, which tribes regulate, upon a showing of "sufficient" state interests. *See, e.g., Cabazon,* 480 U.S. at 216-217.[7] Amici suggest that, in cases such as this, where the Tribe has a land use regulatory scheme in place, which applies equally to members and non-members, non-members should be required to show significant off-reservation impacts to justify concurrent state jurisdiction.

For instance, non-members should be required to show an interest in conservation of a scarce resource guaran-

[7]Amici maintain that tribal authority is exclusive over all lands within the reservation boundaries. As to the issue of the scope of tribal authority in the area which does not have controlled access (Petitioner Wilkinson's and Petitioner County of Yakima's cases), amici adopt the arguments of Respondents that this issue is not properly before the Court at this time. Alternatively, should this Court find that the record is adequate to determine whether tribal authority is exclusive or concurrent in that area, amici submit that the record as it now stands reflects that the Tribe should prevail.

teed to them by federal treaty, *e.g., Puyallup Tribe v. Department of Game,* 391 U.S. 392 (1968), or that activities occurring on-reservation have off-reservation effects, *e.g., Rice v. Rehner,* 463 U.S. 713 (1983), or that denial of non-Indian authority would severely affect the health or welfare of the state, *cf. Montana,* 450 U.S. at 566. But the mere provision of on-reservation services and functions should not amount to a state interest which would justify concurrent jurisdiction.

Moreover, even under a threshold showing of off-reservation impacts, the state interest should fall to a compelling tribal interest. States should not be permitted to regulate concurrently through land use and zoning fee lands within a reservation unless they show that it is necessary to mitigate against impacts occurring beyond the reservation boundaries, and the tribe does not have a competing compelling interest in regulation.

Petitioners, of course, have not demonstrated such a state interest in this case. They do not claim the County is regulating in the interests of conservation of a treaty resource, and they have not shown any off-reservation effects which would justify concurrent regulation *Whiteside,* 828 F.2d at 535-536.

Moreover, the tribal interests in this case are compelling. In addition to its general interest in exercising its sovereign authority—an interest well-supported by modern federal law and policy—tribal zoning protects agriculture, grazing, timber, and wildlife resources. *Whiteside,* 828 F.2d at 535. These resources are the Tribe's main economic support and food supply. The Tribe's cultural values also motivate protection and control of land use. The Tribe has a great interest in preventing

unfettered growth and its detrimental side effects, which, if permitted, will be irreversible and a force to which the Tribe has no defense. From initially expressly reserving its rights to land and resources in its treaty, to the modern zoning and land use regulation, the Tribe has engaged in a concerted progressive effort to control and manage the reservation's land and natural resources.

Finally, common sense dictates that in order for zoning to be effective, it needs to be vested in the one government which has the authority to regulate all lands within the reservation—the tribe. The essence of zoning is a comprehensive scheme. Since the County clearly lacks jurisdiction over Indian lands it cannot administer an all-encompassing code on the reservation or address cumulative impacts on both fee and trust lands. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038 (1977). Therefore exclusive authority over the non-member fee lands must lie with the Tribe.

Given the strong tribal interests and the absence of any significant off-reservation impacts in support of a state interest, State or County authority to zone within the Yakima Reservation should be held to be preempted and not otherwise justified.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be remanded for modification with instructions from this Court in light of the foregoing changes in *Montana* suggested by amici, or alternatively, the decision below should be affirmed.

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CONSOLIDATED

In The
Supreme Court of the United States
October Term, 1988

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND THE BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, QUINAULT INDIAN NATION, TULALIP TRIBES OF WASHINGTON, AND MUCKLESHOOT INDIAN TRIBE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 6

ARGUMENT 6

I. NONE OF THE ARGUMENTS RAISED BY PETITIONERS PRECLUDE TRIBAL LAND USE REGULATION OF NON-INDIANS WITHIN INDIAN RESERVATIONS. 6

A. *Neither Federally Authorized Land Purchases, Nor A Substantial Non-Indian Presence On The Reservation, Nor The Fifth Amendment Divest Indian Tribes Of Their Authority Over Reservation Lands.* 6

B. *The Indian Reorganization Act Preserved Tribal Sovereignty.* 12

C. *The Inability Of Non-Indians To Vote In Tribal Elections Is Not A Bar To The Exercise Of Tribal Sovereignty.* 12

D. *Petitioners' Assertions That Tribal Zoning Decisions Are Potentially Unfair Are Not Ripe For Review And Are Unfounded.* 13

II. COMPREHENSIVE ZONING IS ESSENTIAL TO TRIBAL SOVEREIGNTY. 15

A. *Zoning Is Integral To A Government's Responsibility To Protect Health And Welfare.* 15

B. *Tribal Zoning Authority Is The Sole Means Of Ensuring Comprehensive Planning On Reservations.* 16

C. *The Courts Have Uniformly Upheld Tribal Authority To Zone.* 18

TABLE OF CONTENTS—Continued

Page

III. THE EXECUTIVE AND LEGISLATIVE BRANCHES OF THE FEDERAL GOVERNMENT RECOGNIZE AND PROMOTE COMPREHENSIVE TRIBAL AUTHORITY OVER THE RESERVATION ENVIRONMENT. 22

A. *The Executive Branch.* 22

B. *The Legislative Branch.* 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Antoine v. Washington, 420 U.S. 194 (1975) 4

Brown v. Washoe Housing Authority, 835 F.2d 1327 (10th Cir. 1988) 14

Bryan v. Itasca County, 426 U.S. 373 (1976) 5, 11

Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906) 9

Cardin v. DeLaCruz, 671 F.2d 363 (9th Cir.), *cert. denied* 459 U.S. 967 (1982) 10, 20

Colville Confederated Tribes v. Cavenham Forest Industries, 14 Indian Law Rptr. 6043 (Colv. Tr. Ct. Nov. 16, 1987) (appeal pending) 2

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied* 452 U.S. 1092 (1981) 2, 17

Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), *cert. denied* 459 U.S. 977 (1982) 11, 13, 21

Confederated Tribes of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987) 16

Euclid v. Ambler Realty Co., 272 U.S. 379 (1926) 14, 15

Governing Council of the Pinoleville Indian Community v. Mendocino County, 684 F.Supp. 1042 (N.D. Cal. 1988) 20

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 12, 14, 15, 22

Kerr-McGee Corporation v. Navajo Tribe of Indians, 471 U.S. 195 (1985) 12

TABLE OF AUTHORITIES—Continued

Page

Knight v. Shoshone and Arapahoe Tribes, 670 F.2d 900 (10th Cir. 1982) 16, 19

Lummi Tribe v. Hallauer, 9 Indian Law Rptr. 3025 (W.D. Wash. 1982) 17

Mattz v. Arnett, 412 U.S. 481 (1973) 11

McClanahan v. Arizona Tax Com'n, 411 U.S. 164 (1973) 2, 11

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 10, 11

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 10, 17

Montana v. United States, 450 U.S. 544 (1981) 12, 15, 19, 21

Morris v. Hitchcock, 194 U.S. 384 (1904) 7, 8, 9, 11

Morris v. Hitchcock, 21 App. D.C. 565 (1903) 7, 8, 9

Morton v. Mancari, 417 U.S. 535 (1974) 13

Nance v. EPA, 645 F.2d 701 (9th Cir.), *cert. denied* 454 U.S. 1081 (1981) 27

National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985) 14

Nectow v. City of Cambridge, 277 U.S. 185 (1928) 14

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 12, 17, 18

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 12, 19, 28

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) 15

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 14

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), *cert. denied* 429 U.S. 1038 (1977) 5, 16, 17

TABLE OF AUTHORITIES—Continued

Page

Schad v. Borough of Mount Ephram, 452 U.S. 61 (1981) 16

Sechrist v. Quinault Indian Nation, 9 Indian Law Rptr. 3064 (W.D. Wash. 1982) 21

Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987) 19

Seymour v. Superintendent, 368 U.S. 351 (1962) 11

Snohomish County v. Seattle Disposal Co., 70 Wn. 2d 668, 425 P.2d 22, *cert. denied* 389 U.S. 1016 (1967) 10, 19

Snowbird Constr. Co. v. United States, 666 F.Supp. 1437 (D. Idaho 1987) 15

Twin City Construction Co. v. Turtle Mountain Band of Chippewa Indians, — F.2d — (8th Cir. 1988) 14

United States v. Celestine, 215 U.S. 278 (1909) 11

United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980) 19

United States v. Mazurie, 419 U.S. 544 (1975) 12, 13

United States v. Turtle Mountain Housing Authority, 816 F.2d 1273 (8th Cir. 1987) 15

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 12, 22

Washington Department of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) 25

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 4, 10

Wellman v. Chevron U.S.A. Inc., 815 F.2d 577 (9th Cir. 1987) 15

TABLE OF AUTHORITIES—Continued

	Page
Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)	14
STATUTES	
18 U.S.C. § 1151	11
25 C.F.R. § 1.4	19
Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*	27
42 U.S.C. § 7474(c)	27
Curtis Act of June 28, 1898, 30 Stat. 495	8
Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136u	26
Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1362	12
Indian Self-Determination Act, 25 U.S.C. §§ 450-450n; 455-458e	25
Safe Drinking Water Act Amendments of 1986 (SDWA), P.L. 99-339, § 302, 42 U.S.C. § 300j-11	27, 28
Superfund Amendments and Reauthorization Act of 1986 (SARA), P.L. 99-73 § 207, 42 U.S.C. § 9626	27
Water Quality Act Amendments of 1987 (CWA), P.L. 100-4, § 506, 33 U.S.C. § 1377	26
OTHER AUTHORITIES	
107 Cong. Rec. 17121 (1961)	12
123 Cong. Rec. 513.605 (daily ed. Aug. 4, 1977)	26
EPA Journal, Vol. 12, No. 1 pp. 23-26 Jan/Feb 1986	4
EPA Journal Vol. 13, No. 3 pp. 28-31 April 1987	4

TABLE OF AUTHORITIES—Continued

	Page
53 Fed. Reg. 26968 (July 15, 1988)	4
F. Cohen, *Handbook of Federal Indian Law* (1982 ed.)	8
F. Cohen, *Handbook of Federal Indian Law* (1942 ed.)	8
78 I.D. 229 (April 19, 1971)	26
23 Op. Att'y. Gen. 214 (1900)	9
Powers of Indian Tribes, 55 I.D. 14 (1934)	22
Summary Report of Hearings and Investigations by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 88th Cong. 2d Sess. (1964)	12
Taylor, "Modern Practice in Indian Courts," 10 *UPS Law Review* 231 (1987)	14
6 Weekly Comp. Pres. Doc. 894 (July 8, 1970)	22
19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983)	23
APPENDICES	
Land Ownership Map of the Quinault Indian Reservation	A- 1
Letter from Grays Harbor County Prosecuting Attorney	A- 2
Letter from Jefferson County Planning Department	A- 3
County Executive Memorandum, King County, Washington	A- 5
Motion of King County, Washington Council	A- 6
Excerpts of the Record of *Morris v. Hitchcock*	A-10
Opinion of the Attorney General for the State of Oregon, 43 Op. Atty. Gen. Oregon 169 (1983)	A-32

TABLE OF AUTHORITIES—Continued

Page

Letter Opinion, Attorney General for the State of Wisconsin (1982) A-58

EPA Policy for Program Administration on American Indian Reservation Lands (1980) A-64

EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984) A-76

INTEREST OF THE AMICI CURIAE

The *amici curiae*—Confederated Tribes of the Colville Reservation, Quinault Indian Nation, Tulalip Tribes of Washington and the Muckleshoot Indian Tribe ("Tribes")—are federally recognized Indian tribes located in the State of Washington. They each occupy reservations set aside by the federal government for the overall purpose of providing a permanent homeland.[1] In

[1]The main portion of the Colville Reservation encompasses approximately 1.3 million acres in Okanogan and Ferry Counties. Other Colville Reservation lands are scattered throughout north central Washington State. The Reservation lands are rich in water resources, which are of great importance to the Colvilles. The topography is mostly mountainous. Major land uses include timber harvesting and processing, grazing, dryland and irrigated farming, and recreation. Approximately 80 percent of the Reservation lands are held in trust by the Colvilles or their individual members. Some checkerboarding occurs, with most mixed land ownership found along the river valleys and adjacent to the towns that border the reservation.

The Quinault Indian Reservation, located on the Olympic Peninsula in Grays Harbor and Jefferson Counties, encompasses approximately 190,000 acres of mostly forested, undeveloped lands. Lake Quinault, two major rivers (the Queets and the Quinault), hundreds of smaller rivers and creeks and seventeen miles of coastline, all lie within the Reservation boundaries. As a result of allotment, trust and fee parcels are interspersed throughout the Reservation. Other parcels are a mixture of fee and trust ownership. This checkerboard pattern of land ownership is typical of land patterns on many reservations. A-1.

The Tulalip Indian Reservation is located on the eastern shore of Puget Sound in Snohomish County. It encompasses approximately 22,000 acres, or 35 square miles, of mostly forested, rolling land. Sixteen miles of saltwater tidelands, seven lakes, three major streams, a bay, and several miles of river shoreline all lie within the Reservation boundaries.

The Muckleshoot Indian Reservation, located in King and Pierce Counties, is approximately 3600 acres in size. The White River, which flows through the Reservation, is an important resource of the Tribe. The Reservation is located between the cities of Seattle and Tacoma, in an area of potential future growth. For the most part, the Reservation consists of farming and residential development, along with small commercial activities.

establishing these reservations, the United States led tribal ancestors to believe that, by settling upon them, tribes would be free to foster and preserve their way of life. *See, e.g., McClanahan v. Arizona Tax Com'n,* 411 U.S. 164, 174-175 (1973); *Colville Confederated Tribes v. Walton,* 647 F.2d 42, 49 (9th Cir.), *cert. denied,* 452 U.S. 1092 (1981).

Consistent with this purpose and well-settled principles of federal Indian law, each of the Tribes have exercised some form of land use planning or zoning regulation over all of their reservation lands for many years.[2] The Tribes all have Planning Commissions and Planning Departments, staffed by professionals, that carry out comprehensive planning.[3] The Tribes' plans serve to identify areas deemed appropriate by the Tribes for low and high density residential growth, commercial and industrial development, and environmental protection. Each of the Tribes provides for judicial review or the quasi-judicial review that is typical in land use regulatory systems. *See e.g. Colville Confederated Tribes v. Cavenham Forest In-*

[2]For example, the Quinault Nation adopted its first reservation-wide zoning ordinance in 1967, adopted the Uniform Building Code, and enacted its own sanitation ordinance. In 1974, the Quinault Comprehensive Plan was approved. The Tulalip adopted a reservation-wide land use plan in 1972. The Tulalips are in the process of updating that plan, and adopting a comprehensive zoning ordinance in accordance with the Tulalip's federally approved Planning Enabling Act. The Colville and Muckleshoot Tribes enacted reservation-wide land use ordinances in the 1970's.

[3]The Tribal Planning Commissions generally reflect the entire reservation communities. For example, the Tulalip's Planning Commission composition includes representatives from the tribal membership, the non-Indian community and the non-member Indian community. The Muckleshoot Tribe's zoning ordinance requires that at least one member of the Planning Commission must be a non-member who owns property on the reservation.

dustries, 14 Indian Law Rptr. 6043 (Colv. Tr. Ct. Nov. 16, 1987) (appeal pending).

The Tribes all have various degrees of on-going, cooperative relationships with the surrounding county and local governments. For example, Grays Harbor County and Jefferson County defer to the Quinault Nation's land use authority within its Reservation, and King County routinely refers all applicants to the Muckleshoot Tribe for permits for activities occurring on that Reservation. A-2 to A-6. In 1972 Snohomish County adopted the Tulalip's comprehensive land use plan, as the comprehensive plan for the Reservation.[4]

Reservation-wide zoning authority is crucial to the Tribes' ability to regulate the intensity and location of development in order to reflect their overall infrastructure planning.[5] Zoning and land use planning are traditionally areas of local concern. Tribes are the governmental entities with the greatest interest in the health and welfare of their reservations. Counties, on the other hand, generally do not have a great interest in reservations because lands within reservations usually make up only a small part of a county.

Zoning and comprehensive land use planning are critical tools in the implementation of fish and wildlife man-

[4]Recently, a Snohomish County road project that would cross Tulalip tribal lands was reviewed and permitted pursuant to the Tulalip's zoning ordinance.

[5]For example, the Tulalip recently received Environmental Protection Agency (EPA) funding for expanding and improving its wastewater treatment facility (the only such facility serving the reservation), which is now at capacity. Although the Tribe is actively pursuing alternative sewage treatment measures, the county continues to allow projects using septic tanks in areas where septic systems have failed.

agement.[6] Fish and wildlife are resources of overriding importance to the Tribes. Each of the Tribes have exclusive on-reservation reserved fishing and hunting rights. *See e.g. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.,* 443 U.S. 658 (1979); *Antoine v. Washington,* 420 U.S. 194 (1975). Fishing and hunting provide important economic and cultural benefits to the Tribes and their members. Protection of fish and wildlife habitat, through the regulation of development on all lands within reservations, is essential to the Tribes' goals of increasing fish and game populations.[7]

More than ten years ago, the Ninth Circuit articulated an important rationale for protecting tribal control over Indian reservations:

> . . . subjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities. Local communities may not share the usually poorer Indian's priorities, or may in fact be in economic competition and seek, under the guise of general regulations, to channel development elsewhere . . . .

[6]Protection of tribal water resources is also served by the Tribes' reservation-wide land use regulations. For example, in 1985, the Colville adopted the Colville Water Quality Management Plan (CWQMP). The EPA considers the Plan a model non-point source pollution prevention program. See, EPA Journal, Vol. 12, No. 1 pp. 23-26 Jan/Feb 1986; EPA Journal Vol. 13, No. 3 pp. 28-31 April 1987. The CWQMP regulates activities that affect the quality of water resources of the Colville. The Colville's water quality standards are currently being promulgated as federal standards by the EPA, 53 Fed. Reg. 26968 (July 15, 1988), and their incorporation into the Colville's comprehensive plan and zoning controls is an important enforcement mechanism.

[7]For example, the Quinault Nation's Conservation Code, enacted in 1967, and replaced by a more detailed Conservation Code in 1984, regulates all hunting and fishing on the Reservation. The Conservation Code also regulates activity in and around Reservation waters and requires the issuance of a tribal hydraulic project approval before any such activity begins. These tribal laws attempt to strike a balance between the need to protect the Reservation environment, particularly the fishery resource, from the adverse effects of logging and other activities and the need to allow such activities, to provide economic benefits to Indian and non-Indian landowners.

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 664 (9th Cir. 1975), *cert. denied* 429 U.S. 1038 (1977). This Court has recognized these concerns. *Bryan v. Itasca County,* 426 U.S. 373, 388 n.14 (1976). Although the Tribes have been able to achieve some degree of cooperation with neighboring governments, the Tribes cannot rely on others to implement tribal goals and priorities, or protect tribal interests.[8]

Reservation-wide tribal zoning and planning have been effectuated on a number of reservations, in cooperation with neighboring jurisdictions, with substantial benefits to reservation communities. A ruling that Indian tribes lack land use regulatory authority over reservation fee lands would effectively destroy their ability to direct and regulate growth consistent with the unique needs and priorities of reservation communities. A ruling that, unlike all other governments, tribes must meet a stringent impact test, and repeatedly justify, on a case-by-case basis,

[8]For example, even though Snohomish County adopted the Tulalip's comprehensive plan, the county's interpretation of that plan differs from the Tulalip's, and the county's zoning standards do not necessarily conform to the plan's land use designations. The county recently allowed an applicant who owns fee land on the reservation to include marshlands in calculating development density. The Tulalip would have excluded the marshlands from the buildable acreage because of the importance of marshlands to fish and wildlife. Moreover, in the reservation's northeast section, county zoning allows dwelling unit densities four times greater than those permitted by the Tulalip plan.

the exercise of zoning authority within their territories would perpetuate uncertainty in land use control and encourage continual legal challenges. This would not be consistent with the purposes for which Indian reservations were set aside—the promotion of tribal economic development and self-sufficiency—or prior case law.

SUMMARY OF ARGUMENT

In this case, the Court is presented with many of the same arguments that it has heard and rejected before concerning tribal civil regulatory authority over non-Indians on Indian reservations. This Court has rebuffed the notion that federally authorized land purchases within reservations by non-Indians preclude tribal regulatory authority. Further, petitioners' speculative claims of the alleged unfairness of the tribal land use process are not ripe for review in this case.

Comprehensive zoning is essential to the exercise of tribal sovereignty. Zoning is integral to the tribes' ability to protect the health and welfare of their reservation communities, and it is the sole means of ensuring comprehensive planning on reservations. All three branches of the federal government have recognized this tribal authority as necessary.

ARGUMENT

I. NONE OF THE ARGUMENTS RAISED BY PETITIONERS PRECLUDE TRIBAL LAND USE REGULATION OF NON-INDIANS WITHIN INDIAN RESERVATIONS.

A. Neither Federally Authorized Land Purchases, Nor A Substantial Non-Indian Presence On The Reservation, Nor The Fifth Amendment Divest Indian Tribes Of Their Authority Over Reservation Lands.

The arguments against tribal jurisdiction raised by Petitioners and their supporting *amici* (*see e.g.* Brief of the States of Arizona *et al.* at 2-4) are the same arguments this Court has heard and rejected before. In 1904, when the Court upheld the Chickasaw Nation's power to tax non-Indian owned property within its Reservation, similar contentions were made about the federal allotment act "promises," the effects of non-Indian land ownership and towns within tribal territory, and the inability to participate in tribal government. *See, Morris v. Hitchcock*, 194 U.S. 384 (1904).

In *Morris,* non-Indian owners of cattle and horses in the Chickasaw territory challenged an annual tribal tax on their animals. They argued federal Indian policy had undergone a radical change since the treaties were signed. Originally the federal policy was to ensure that reservations were exclusively for tribes. By the late 1800's, however, that policy had shifted. Non-Indians were then permitted to buy and own land, and incorporate towns on the reservations. A-30. (Excerpts of the *Morris* record are contained in the Appendix at A-10 to A-31.) According to the *Morris* plaintiffs, there were roughly 150,000 white inhabitants, and only 8,000 people "claiming" to be Indians on the Chickasaw Reservation. A-25 to A-27. The *Morris* plaintiffs argued that enforcement of the tax had insufficient judicial checks, and the tribal tax violated their due process rights. A-11 to A-17, A-23 to A-24, A-27 to A-29.

The *Morris* plaintiffs also argued that the tribal tax was repugnant to the Fourth and Fifth Amendments to the Constitution. A-22. In the Court of Appeals, they contended tribal sovereignty could not extend to them be-

cause they had no voice in tribal government. *Morris v. Hitchcock,* 21 App. D.C. 565, 577 (1903). The Court of Appeals said:

> A government of this kind necessarily has the power to maintain the existence and effectiveness through the exercise of the usual power of taxation upon all property within its limits, save as may be restricted by its organic law. Any restriction in the organic law in respect of this ordinance's power of taxation, and the property subject thereto, ought to appear by express provision or necessary implication. . . . Where the restriction upon this exercise of power by a recognized government is claimed under the stipulations of a treaty with another, whether the former be dependent upon the latter or not, it would seem that its existence ought to appear beyond a reasonable doubt. We discover no such restriction. . . .

21 App. D.C. at 593. This Court affirmed, noting that Congress had permitted "the continued exercise, by the legislative body of the tribe, of such [taxing] power. . . ." 194 U.S. at 393. The purchase of lands, the Court noted, did not affect the right of a tribe to regulate non-Indian activities. *Id.* at 391-92.

In *Morris,* the Curtis Act of June 28, 1898, 30 Stat. 495, authorized purchases of Indian lands. *See* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) p. 774. The act abolished the tribal courts of the Five Civilized Tribes and reflected a federal policy to terminate those tribes. *See,* F. Cohen, *Handbook of Federal Indian Law* (1942 ed.) pp. 429-430. However, the termination had not yet been accomplished and the territory was still Indian country. Quoting with approval a 1900 Attorney General Opinion, this Court said:

> The provisions of the Act of June 28, 1898 (30 Stat. 495) for the organization of cities and towns in said Indian country, and the extinguishment of Indian title therein have not yet been consummated, and it is still Indian country. This act does not deprive these Indians of the power to enact laws with regard to licenses and taxes, nor exempt purchasers of town or city lots from the operation of such legislation. Purchasers of lots do so with notice of existing Indian treaties, with full knowledge that they can only occupy them by permission from the Indians. Such lands are sold under the assumption that the purchasers will comply with the local laws.

Morris, 194 U.S. at 391-92.[9]

A year later, the Eighth Circuit explained why non-Indians should not have assumed their federally authorized land purchases within an Indian reservation immunized them from tribal regulation:

> But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with the power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor a State, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership or occupancy of the land within its territorial jurisdiction by citizens or foreigners.

Buster v. Wright, 135 F. 947, 951 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906). This Court recently concurred in this statement and, emphasizing that tribal regulatory authority over nonmembers survives their acquisi-

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[9]The Attorney General had concluded that "even if the Indian title to the particular lots sold had been extinguished . . . . the result is the same, for the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation." 23 Op. Att'y Gen. 214, 217 (1900).

tion of title to reservation land, held that the tribal right to exclude nonmembers from tribal land is not the sole basis for taxing them. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 143-44 (1982).

This Court has characterized as "untenable" the argument that federal allotment policy, reflected in the General Allotment Act, exempted fee patent lands from being treated the same as other reservation lands for jurisdictional purposes. *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 477-79 (1976).[10] *See also, Cardin v. DeLaCruz,* 671 F.2d 363, 367 n.5 (9th Cir.), *cert. denied* 459 U.S. 967 (1982). Although the General Allotment Act provided for state jurisdiction after a reservation was entirely allotted and the trust period for all reservation parcels expired, this act did not change the jurisdictional relationships between tribes and states. *Moe,* 425 U.S. at 477.

This Court has repeatedly rejected the notion that opening an Indian reservation to non-Indian settlement automatically diminishes the status of non-Indian owned

[10]Although petitioners rely heavily on the General Allotment Act to argue against tribal jurisdiction, the Yakima Reservation was, in fact, allotted and parcels sold pursuant to special treaty provisions and not pursuant to the General Allotment Act. The General Allotment Act provisions on alienation and jurisdiction do not apply to reservations allotted pursuant to a treaty. *See United States v. Celestine,* 215 U.S. 278 (1909); *Snohomish County v. Seattle Disposal Co.,* 70 Wn.2d 668, 670-71, 425 P.2d 22, 25, *cert. denied* 389 U.S. 1016 (1967). Those treaty provisions gave no indication tribal sovereignty on the Reservation would be lost over lands sold to non-Indians. Those treaty provisions must be read *in pari materia* with provisions promising tribal control over non-Indians who desire to enter the reservation and in accordance with the likely Indian understanding. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.,* 443 U.S. 658, 675-76 (1979).

lands as Indian country. *See, Mattz v. Arnett,* 412 U.S. 481, 504-05 (1973); *Seymour v. Superintendent,* 368 U.S. 351, 356-57 (1962); *United States v. Celestine,* 215 U.S. 278 (1909). *See also* 18 U.S.C. § 1151. Any Congressional intent to diminish tribal authority must be clearly expressed. *See, Merrion,* 455 U.S. at 148-49, and n.14; *Bryan v. Itasca County,* 426 U.S. 373, 388-89 and n.14 (1976); *Morris v. Hitchcock,* 194 U.S. at 392-93.

While the petitioners claim that General Allotment Act purchasers were "promised" immunity from tribal governmental authority, they point to no statutory language making such a promise.[11] On the other hand, this Court has considered treaty provisions setting aside an Indian reservation for a tribe's exclusive use and occupancy and excluding non-Indians. The Court has found that the intent of these provisions was to place reservations under exclusive tribal sovereignty, subject to general federal supervision. *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164, 174-75 (1973). *See also, Confed-*

[11]In support of their position, petitioners maintain that land ownership patterns on reservations have remained static since the effects of the Allotment Act were noticed. In fact, the opposite is true. For example, the Yakima Nation's land consolidation program has reversed the land ownership trend started by the allotment process. At Tulalip, tribal housing and economic development programs have resulted in the reservation's Indian population increasing at a greater rate than the reservation's non-Indian population. Moreover, non-Indian population statistics include a substantial number of non-Indians who lease waterfront lands from the Tulalip, having been attracted to the reservation by the unique environmental amenities there.

erated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 963 n.30 (9th Cir.), *cert denied* 459 U.S. 977 (1982).[12]

B. The Indian Reorganization Act Preserved Tribal Sovereignty.

Petitioners' claim that the Indian Reorganization Act (IRA), which was passed in order to reconfirm tribal sovereignty, somehow actually diminished that sovereignty, is without merit.[13] Congress passed the Act to advance tribal self-government, not to stifle it. The IRA does nothing to limit tribal authority over nonmembers. *Kerr-McGee Corporation v. Navajo Tribe of Indians,* 471 U.S. 195, 199 (1985) (Congressionally acknowledged tribal authority to tax nonmembers preserved by IRA).

C. The Inability Of Non-Indians To Vote In Tribal Elections Is Not A Bar To The Exercise Of Tribal Sovereignty.

As held in *United States v. Mazurie,* the fact that non-Indian landowners cannot become tribal members or vote

[12]The petitioners' interpretation of *Montana v. United States,* 450 U.S. 544 (1981), and the effect of *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978) and the General Allotment Act on tribal civil jurisdiction, is inconsistent with this Court's prior rulings in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 153 (1980) and *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983). It also contradicts this Court's interpretation of *Montana* contained in *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987).

[13]Continuing Congressional recognition, after the IRA, that tribes have governmental authority over non-members is reflected in provisions of the Indian Civil Rights Act (ICRA). 25 U.S.C. §§ 1301-1362. For example, 25 U.S.C. § 1302(5) prohibits tribes from taking "any private property for a public use without just compensation." The acknowledged power of tribes to tax non-Indians was one of the factors leading Senator Ervin to sponsor the ICRA. *See,* 107 Cong. Rec. 17121 (1961); Summary Report of Hearings and Investigations by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 88th Cong. 2d Sess. 4-6 (1964). The takings restriction is consistent with the ordinary limits on permissible zoning authority.

in tribal elections does not preclude an exercise of tribal sovereignty over non-Indians, or Congressional delegation of tribal regulatory authority.[14] 419 U.S. 544, 557-58 (1975). *See, Morton v. Mancari,* 417 U.S. 535, 554-55 (1974); *Confederated Salish and Kootenai Tribes v. Namen,* 665 F.2d at 964 n.31. *See also* 43 Op. Atty. Gen. Oregon 169, 180-81 (1983) reprinted in the appendix at A-53 to A-55. In *Mazurie,* this Court explicitly rejected the Tenth Circuit's characterization of tribal sovereignty, echoed by petitioners, as limited to members, with tribal powers over non-members commensurate with those of a landowner or private voluntary organization. *Mazurie,* 419 U.S. at 556-57.

The determining factor in a government's exercise of zoning authority is whether the land is within the borders of that government, and not whether one can vote. Many landowners do not reside in the area of their landholdings, and, of course, businesses cannot vote. The essential protection of landowners against arbitrary zoning actions by government is due process, not the ability to vote.

D. Petitioners' Assertions That Tribal Zoning Decisions Are Potentially Unfair Are Not Ripe For Review And Are Unfounded.

Petitioners and their supporting *amici* also make vague, sweeping allegations that tribal land use decisions would be unfair. It is premature for the Court to reach

[14]Contrary to petitioners' assertions, non-Indians do participate in tribal government, particularly in the area of land use. Many tribes provide for the representation of non-Indians on decisionmaking bodies that regulate the reservation environment. *See* footnote 3 *supra.*

these issues in this case. In land use cases, this Court has gone to great pains to ensure that such decisions are final, and all review avenues exhausted, before ruling on the appropriateness of the particular land use decision. *See e.g. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186 (1985) (issues not ripe because land owner had not received a final decision on its application, nor exhausted review procedures). The petitioners have never applied for tribal permits, nor have they participated in the tribal land use process. Their allegations are mere speculation. Thus, the present case is similar to *Euclid v. Ambler Realty Co.,* 272 U.S. 379 (1926), which upheld generally the power to zone, but left to later cases whether a particular land use decision was valid. *Compare Euclid* with *Nectow v. City of Cambridge,* 277 U.S. 185 (1928).[15]

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[15]It is claimed that non-Indians will be harmed by arbitrary tribal action because it is not "subject to any effective judicial checks". *See e.g.* Brief of Arizona *et al. at 2.* Yet no evidence has been offered to discredit the integrity of tribal review forums in the area of land use. Similar arguments were made and rejected by the Court in *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987). In *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), this Court noted that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Non judicial tribal institutions also have been recognized as competent law applying bodies." *Id.* at 65-66 and nn. 21 and 22. (citation omitted). *See generally,* Taylor, "Modern Practice in Indian Courts," 10 *UPS Law Review* 231, 252-259 (1987). Tribal courts should have the initial opportunity to determine their own jurisdiction involving disputes over the on-reservation activities of non-Indians. *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987); *National Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845 (1985); *Twin City Construction Co. v. Turtle Mountain Band of Chippewa Indians,* — F.2d — (8th Cir. 1988); *Brown v. Washoe*

(Continued on following page)

II. COMPREHENSIVE ZONING IS ESSENTIAL TO TRIBAL SOVEREIGNTY.

A. Zoning Is Integral To A Government's Responsibility To Protect Health And Welfare.

The exercise of zoning authority by tribes over non-Indian activities on reservations falls within the "health and welfare" exception articulated by this Court in *Montana v. United States,* 450 U.S. 544, 566 (1981). This Court first recognized over sixty years ago that, in order to protect the health and welfare of a community, a government must be able to exercise comprehensive regulatory powers over lands within its borders. *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). *Accord Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922). The ability to regulate the use of land is one of the most basic indicia of governmental authority.

Simply because non-Indians are able to own land within reservations does not change the purpose of Indian reservations. The purpose still is to provide places where Indians can preserve and protect their way of life. This

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(Continued from previous page)

Housing Authority, 835 F.2d 1327 (10th Cir. 1988); *United States v. Turtle Mountain Housing Authority,* 816 F.2d 1273 (8th Cir. 1987); *Wellman v. Chevron U.S.A. Inc.,* 815 F.2d 577 (9th Cir. 1987); *Snowbird Constr. Co. v. United States,* 666 F.Supp. 1437 (D. Idaho 1987).

Tribal courts can have inherent jurisdiction to review tribal land use decisions involving non-Indians. The Court recognized in *Iowa Mutual* that:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.
>
> Civil jurisdiction over such activities [of non-Indians] presumptively lies in the tribal court unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. at —; 107 S.Ct. at 978.

Court has previously recognized the importance of zoning to foster and protect a certain quality of life. "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Borough of Mount Ephram*, 452 U.S. 61, 68 (1981); *See also Knight v. Shoshone and Arapahoe Tribes*, 670 F.2d 900, 903-04 (10th Cir. 1982).

B. Tribal Zoning Authority Is The Sole Means Of Ensuring Comprehensive Planning On Reservations.

The fundamental purpose behind land use planning is to provide a comprehensive process for the regulation of lands within a given area. It is uncontested that tribes have exclusive authority over trust and restricted lands within Indian reservations. *See*, Yakima County Brief at 6 and 22.[16] *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied* 429 U.S. 1038 (1977). It necessarily follows that, in order to ensure comprehensive planning, tribes must have the ability to exercise zoning authority over their entire reservations. To hold otherwise would entirely defeat the primary purpose of land use planning. This is precisely the view of the Ninth Circuit: "If we were to deny Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme." *Confederated Tribes of the Yakima Indian Nation v. Whiteside*,

[16]Yakima County necessarily concedes that the Yakima Nation has zoning authority over at least some non-Indian lands on that reservation. It did not even file a petition for *certiorari* with this Court in the *Brendale* case.

828 F.2d 529, 534-35 (9th Cir. 1987). The necessity of comprehensive tribal regulation has also been recognized in other contexts.

In *Lummi Tribe v. Hallauer*, 9 Indian Law Rptr. 3025 (W.D. Wash 1982), for example, the court recognized the unworkability of overlapping sewer districts on the Lummi Reservation. The court found that tribal regulation of a sewer system serving the entire Reservation was necessary to protect the economic security, health and welfare of the Lummi Tribe. The court recognized that to allow non-Indians to create ". . . another entity whose boundaries 'gerrymander' around and through the Reservation sewer district could lead to a lack of consistency and uniformity in the administration and operation of the Tribe's system." *Id.* at 3027. Accordingly, the court upheld the tribal requirement for non-Indians to hook up to the Tribe's system.

Another example is *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied* 454 U.S. 1092 (1981) where the court addressed the State of Washington's attempt to regulate a nonnavigable water system located entirely within the Colville Reservation. In holding that the state's regulatory power was preempted, the court stated: "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users." *Id.* at 52. The same is true regarding land use.

This Court has also invalidated state attempts to impose taxing and regulatory schemes on Indian reservations. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 462 (1976). In *Moe* this Court concluded

that checkerboard jurisdiction runs contrary to the intent of federal law. *Id.* at 478.

> Congress . . . has evinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.

Id. at 479.

> Concurrent state jurisdiction would supplant this [tribal] regulatory scheme with an inconsistent dual system: members would be governed by tribal ordinances while non-members would be regulated by general state . . . laws. . . . Tribal ordinances reflect the specific needs of the reservation. . . . State laws in contrast are based upon considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation.

Mescalero, 462 U.S. at 339. As discussed in Section III. *infra,* Congress has evinced an intent that tribes, as the local managers of the reservation environment, have regulatory authority over all persons and lands on reservations.

The checkerboarding, typified by the map of the Quinault Reservation (A-1), highlights the need for unitary management over reservations—a need only tribes can provide. This checkerboarding is not confined to separate parcels of land, but also includes undivided non-Indian fee interests in trust or restricted parcels. Fee lands include non-Indian lands inherited from Indians, such as petitioner Brendale's property, as well as Indian owned fee lands.

C. The Courts Have Uniformly Upheld Tribal Authority To Zone.

The courts have consistently upheld tribal authority to regulate land use on reservation fee lands, as well as

trust or restricted lands. "It is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its land." *Segundo v. City of Rancho Mirage,* 813 F.2d 1387, 1393 (9th Cir. 1987). *See, Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *cert. denied* 429 U.S. 1038 (1977). *Accord, United States v. County of Humboldt,* 615 F.2d 1260 (9th Cir. 1980); *Snohomish County v. Seattle Disposal Co.,* 70 Wn.2d 668, 425 P.2d 22, *cert. denied,* 389 U.S. 1016 (1967). *See also,* 25 CFR § 1.4.

In *Knight v. Shoshone and Arapahoe Tribes,* 670 F.2d 900 (10th Cir. 1982), the Tenth Circuit upheld the jurisdiction of the Shoshone and Arapahoe Tribes to enforce their zoning regulations against non-Indian owners of fee lands on the Wind River Reservation, stating:

> The developers argue that the Tribes have no authority to control the use of fee land by non-Indians without a delegation by Congress of such power. We disagree. Indians Tribes have "attributes of sovereignty over both their members and their territory." Included in the tribal power is "a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." Civil Jurisdiction is distinguishable from the criminal jurisdiction over non-Indians which was denied in *Oliphant v. Suquamish Indian Tribe.*

Id. at 902. (citations omitted)

The court then considered whether a treaty or Congress had affected those Tribes' power:

> In the situation presented no treaty provision is of any pertinence and Congress has not acted to delegate or deny the right to control use of non-Indian owned land located within a reservation. Denial of the right does not arise by implication as a necessary result of their [tribes] dependent status. *Montana v. United*

> *States,* recognizes that: "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." One proper form of the exercise of that power may be in response to "conduct [which] threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe."

Id. (citations omitted)

Problems arise when tribes and counties have conflicting land use plans for reservation fee lands. In *Governing Council of the Pinoleville Indian Community v. Mendocino County,* 684 F.Supp. 1042 (N.D. Cal. 1988), the tribe imposed a one-year moratorium on new industrial uses on the reservation. Shortly thereafter, Mendocino County issued permits for the construction and operation of an asphalt batch plant and a concrete plant within the reservation. The Court held the moratorium applicable to the non-Indian development, despite issuance of permits by Mendocino County.

The *Pinoleville* case is not an isolated case. In *Cardin v. DeLaCruz,* 671 F.2d 363 (9th Cir.), *cert. denied* 459 U.S. 967 (1982), a non-Indian whose grocery store was located on his reservation fee land had been directed by the Quinault Nation to correct a number of health and safety hazards identified by a tribal health inspector. These included fire-hazards, food exposed to rodent contamination, several unlocked refrigerators in open areas threatening the lives of children who played in the area, and an open garbage dump near the store. The Quinault Nation extended numerous opportunities to the owner to clean up his property. When the non-Indian sued, the court upheld the Quinault's authority to regulate non-Indians.

The Quinault zoning authority over reservation fee land was specifically upheld in *Sechrist v. Quinault Indian Nation,* 9 Indian Law Rptr. 3064 (W.D. Wash. 1982). In that case, a California resident who owned fee land on the reservation wanted to construct and operate a recreational vehicle park and campground. He submitted a rezone proposal to the Quinault Land Use Planning Commission in order to be able to develop the park. When Mr. Sechrist lost his bid to have the land zoned from wilderness to commercial, he filed a separate action in federal district court, which upheld the Quinault Nation's zoning authority.

In *Confederated Salish and Kootenai Tribes v. Namen,* 665 F.2d 951 (9th Cir.), *cert. denied* 459 U.S. 977 (1982), the Confederated Tribes asserted regulatory authority over the manner in which non-Indians who owned land on the Reservation bordering Flathead Lake exercised their riparian rights. In applying the *Montana* health and welfare principle, the court upheld the Confederated Tribes' authority because:

> The conduct the Tribes seek to regulate in the instant case—generally speaking, the use of the bed and banks of the south half of Flathead Lake—has the potential for significantly affecting the economy, welfare, and health of the Tribes. This conduct, if unregulated, could increase water pollution, damage the ecology of the lake, and interfere with treaty rights or otherwise harm the lake which is one of the most important tribal resources. Hence, the challenged ordinance falls squarely within the exception recognized in *Montana.* (footnote omitted.)

Id. at 964.

The courts are not alone in recognizing tribal authority to zone Reservation fee land. Recognition of these principles also led the Attorney General for the State of

Oregon to conclude that the Umatilla Tribe has exclusive jurisdiction over all land-use activities on the Umatilla Reservation. A-32 to A-57. *See also* Letter opinion, Attorney General of Wisconsin to Vilas County District Attorney (Oct. 19, 1982). A-58 to A-63.

III. THE EXECUTIVE AND LEGISLATIVE BRANCHES OF THE FEDERAL GOVERNMENT RECOGNIZE AND PROMOTE COMPREHENSIVE TRIBAL AUTHORITY OVER THE RESERVATION ENVIRONMENT.

The Executive Branch and Congress have long recognized an Indian tribe's sovereign authority over its members and its territory. Powers of Indian Tribes, 55 I.D. 14, 50 (1934). "Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which tribes have a significant interest, 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855)...." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980); *Iowa Mutual Insurance Co. v. La Plante*, 480 U.S. 9 (1987).

A. The Executive Branch.

In 1970, President Nixon announced a national policy of self-determination for Indian tribes. 6 Weekly Comp. Pres. Doc. 894 (July 8, 1970). At the heart of the new policy was a commitment by the federal government to foster and encourage tribal self-government. President Reagan reaffirmed this commitment in his 1983 Indian

Policy Statement. 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983).[17]

The policies and discretionary programs of EPA also reflect the federal commitment to tribal self-regulation. In June of 1982, the Administrator of EPA directed the EPA Office of Federal Activities to coordinate a study to examine the special legal and political factors affecting EPA program management on Indian lands and to consider the merits of various programmatic and resource options for Indian reservations consistent with President Reagan's Indian Policy. This study, entitled Administration Of Environmental Programs On Indian Lands (Indian Lands Study), was released in July, 1983.[18]

In noting that state governments generally lack adequate regulatory authority within Indian reservations, EPA determined that states could not fulfill, on Indian lands, the regulatory role intended by Congress for local implementing governments. EPA also emphasized that Congress did not specifically provide for the state assump-

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[17]Zoning decisions can affect the types of commercial and industrial projects on reservations and correspondingly, the job and other economic development opportunities available there. Promoting tribal efforts to direct economic development consistent with Indian interests is a major component of the federal policy. Comprehensive zoning authority is essential to achieving these economic development goals. For example, Colville's timber related and recreational enterprises, which employ many tribal members, are dependent on the Tribe's ability to protect forestry and water resources.

[18]The Indian Lands Study was a further refinement of the Agency's earlier efforts to work with tribal governments toward the implementation of a uniform national Indian environmental policy. In December 1980, following more than two years of development, EPA released its Policy For Program Administration On American Indian Reservations. A-64 to A-75.

tion of regulatory powers over reservation affairs. EPA summarized the basis for its policy decision as follows:

> Indian governments have the fundamental legal jurisdiction, generally lacked by state governments, to regulate both Indian and non-Indian pollution sources on the reservation. . . . The tribal interest and potential capability in the environmental arena constitute a national resource with environmental benefits extending beyond the reservation boundaries.
>
> The environment is generally best protected by those who have the concern and ability to protect it. Indian people show an acute sensitivity to their loss of great tracts in this country. . . . This historical fact, combined with a long-standing cultural respect for the earth and its environment, is reflected in tribal expressions of concern for the land, its irreplaceability and the importance of its environmental quality. Certainly, if the principle favoring local stewardship of the environment has meaning anywhere, it is on the Indian reservation.

A-69 to A-70. EPA concluded that the promotion of comprehensive environmental management by tribes was consistent with the overall aims and objectives of the federal environmental laws, and that Indian people should have a central role in decisions affecting the future of reservation life.

On November 8, 1984, then Administrator for EPA, William Ruckelshaus, issued an updated EPA Policy For The Administration Of Environmental Programs On Indian Reservations. Administrator Ruckelshaus stated, "It is the purpose of this statement to consolidate and expand on existing EPA Indian policy statements in a manner consistent with the overall federal position in support of tribal 'self-government' and 'government-to-government'

relations between federal and tribal governments." A-76. The policy set forth nine directives that the EPA would follow in implementing environmental programs on reservation lands. A-78 to A-83.

EPA's Policy has been approved by the courts. The EPA's determination that Washington's delegated hazardous waste program under the Resource Conservation and Recovery Act (RCRA) did not extend to Indian country, was upheld in *Washington Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985). The Court concurred with EPA's determination that the term Indian lands is synonymous with the definition of Indian country and, therefore, includes fee and trust lands on Indian reservations. *Id.* at 1467 n.1. The Ninth Circuit went on to find that "the backdrop of tribal sovereignty, in light of federal policies encouraging Indian self-government, consequently supports EPA's interpretation of R.C.R.A." *Id.* at 1472.

B. The Legislative Branch.

Congress responded to President Nixon's strong expression supporting Indian self-determination when it enacted the Indian Self-Determination Act in 1975. 25 U.S.C. §§ 450-450n, 455-458e. Subsequently, Congress enacted a number of environmental statutes that recognize tribal authority over policy making and program administration as to all reservation lands, and provide additional mechanisms for tribes to protect the reservation environment. Tribal authority over reservation lands must be maintained over all reservation lands because of the significant interrelationship between land use regulation and environmental protection.

The Water Quality Amendments of 1987 (CWA), Pub. L. 100-4, § 506, 33 U.S.C. § 1377, are the clearest expression of this congressional recognition. Under the 1987 amendments, the Administrator of EPA is authorized to treat an Indian tribe as a state if "the functions to be exercised by the tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, *or otherwise within the borders of an Indian reservation.*" 33 U.S.C. § 1377(e)(2) (emphasis added). In keeping with Congress' restrictive view of the reach of state regulatory jurisdiction over Indian lands, Senate debate during the 1977 amendments to the original Federal Water Pollution Control Act acknowledged that the Act did not provide state regulatory jurisdiction over Indian lands. *See*, 123 Cong. Rec. 513.605 (daily ed. Aug. 4, 1977).

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) Act allows Indian tribes to submit reservation-wide pesticide use plans for approval by the Administrator of the EPA, to certify and license pesticide applicators and to maintain primary enforcement responsibility for pesticide use violations occurring on reservations.[19] 7 U.S.C. § 136u.

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[19]As is true of other areas of federal environmental regulation, such as air pollution control, reservation-wide tribal authority was recognized by the Executive branch even before Congress enacted such provisions. In 1971, the Department of Interior had approved a Shoshone-Bannock tribal ordinance which prohibited all aerial spraying of herbicides on the Fort Hall Reservation. This ordinance applied to Indians and non-Indians alike. 78 I.D. 229 (April 19, 1971).

The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, acknowledges the exclusive authority of Indian tribes to redesignate their reservation airsheds and to prevent significant deterioration of reservation air quality. "Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated *only* by the appropriate Indian governing body." 42 U.S.C. § 7474(c) (emphasis added).[20]

The Superfund Amendments and Reauthorization Act of 1986 (SARA), P.L. 99-73 § 207, 42 U.S.C. § 9626, which amended the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), directs EPA to treat Indian tribes in the same manner as states with respect to numerous provisions of CERCLA. Congress also directed the President to conduct a survey to determine the extent of hazardous waste sites on Indian lands and make recommendations on the program needs of Indian tribes under the Act with an emphasis on "how tribal participation in the administration of such programs can be maximized." 42 U.S.C. § 9626(c).

The Safe Drinking Water Act Amendments of 1986 (SDWA), P.L. 99-339, § 302, 42 U.S.C. § 300j-11, authorizes EPA to treat Indian tribes as states, enables the Administrator to authorize primary enforcement responsibility for public water systems and underground injection control, and provides direct grant and contract assistance

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[20]The amendment tacitly approved the position previously taken by EPA in its regulations that Indian tribes alone had the requisite authority to redesignate the reservation airshed. EPA's pre-1977 regulations and tribal authority over the reservation environment were upheld in *Nance v. EPA*, 645 F.2d 701, 712-715 (9th Cir.) *cert. denied*, 454 U.S. 1081 (1981).

to Indian tribes to carry out the functions mandated by the SDWA. In addition, EPA is currently proposing that Indian tribes have primary enforcement responsibility for the sole source aquifer and wellhead protection programs. Recognizing the limited criminal authority Indian tribes exercise over non-Indians, *Oliphant v. Suquamish Tribe,* 435 U.S. 191 (1978), Congress expressly provided that such lack of jurisdiction could not prevent the assumption of primary enforcement responsibility by an Indian tribe for on reservation SDWA programs. 42 U.S.C. § 300j-11 (b)(ii). Congress merely required that, in the exercise of its enforcement responsibility under the Act, an Indian tribe could not regulate in a manner less protective of human health than when a state assumes such responsibility from the EPA.

It is thus apparent that Congress strongly recognizes tribal power to regulate the reservation environment. This includes recognition of tribal regulatory authority over all lands within Indian reservations. Zoning authority is merely another means by which tribes regulate the reservation environment.

———o———

CONCLUSION

For the reasons stated above, this Court should affirm the Ninth Circuit Court of Appeal's determinations in these cases, and hold that Indian Tribes have the inherent power to zone the lands of non-Indians located within Indian reservations.

Respectfully submitted,

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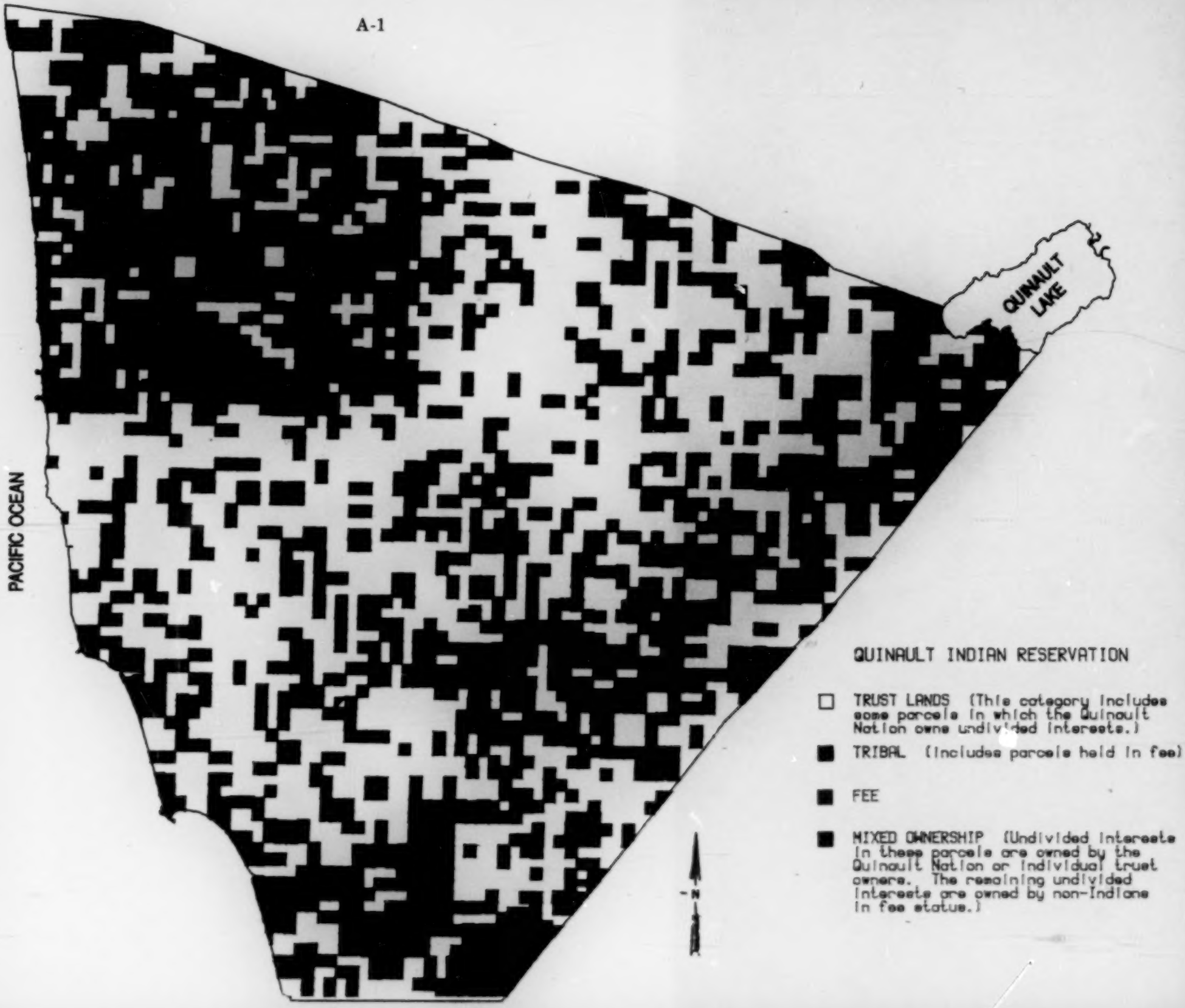
Counsel for Amicus Muckleshoot Indian Tribe

Amy L. Crewdson
Office of the Reservation Attorney
Quinault Indian Nation
P.O. Box 189
Tahola, WA 98587
(206) 276-8211

Counsel for Amicus Quinault Indian Nation

* *Counsel of Record*

APPENDIX


QUINAULT LAKE
PACIFIC OCEAN
N
QUINAULT INDIAN RESERVATION
TRUST LANDS (This category includes some parcels in which the Quinault Nation owns undivided interests.)
TRIBAL (Includes parcels held in fee)
FEE
MIXED OWNERSHIP (Undivided interests in these parcels are owned by the Quinault Nation or individual trust owners. The remaining undivided interests are owned by non-Indians in fee status.)

MICHAEL G. SPENCER
Grays Harbor County Prosecuting Attorney

P.O. Box 550 County Courthouse
Montesano, Washington 98563
(206) 249-3951
SCAN 234-5231

September 24, 1985

Tom Mark
Director of Planning & Building
Montesano, WA 98563

Dear Tom:

Recently, you asked a question regarding your department's authority to issue building permits on the Quinault Indian Reservation. It is my opinion that the Quinault Tribe has jurisdiction over fee patent lands owned by non-Indians, as well as Indian trust lands.

I base this opinion on the recent Ninth Circuit Court of Appeals case, *Cardin v. DeLaCruz,* 671 F.2d 363 (1982). In that case, the court upheld the Quinault Tribe's authority to enforce tribal building, health and safety regulations against a non-Indian on fee patent land. Because these regulations are inherent to tribal self-government, that regulatory authority is retained by them. This position was also recently affirmed in dicta in *Thomsen v. King County,* 39 Wn.App. 505 (1985)

Since the Quinault Tribe has chosen to regulate the zoning and building within the confines of their reservation, in the interest of comity, I believe we should defer to their

authority. I hope this satisfactorily answers your questions.

Very truly yours,

MICHAEL G. SPENCER
Prosecuting Attorney
for Grays Harbor County

By: /s/ Jennifer L. Wieland
JENNIFER L. WIELAND
Deputy Prosecuting Attorney

JLW/deb

JEFFERSON COUNTY
PLANNING AND BUILDING DEPARTMENT

P.O. Box 1220
Port Townsend, Washington 98368

Planning (206) 385-9140
Building (206) 385-9141

David Goldsmith, Director

October 5, 1988

Mr. Rich Wells
Director of Planning
Quinault Indian Reservation
PO Box 189
Takolah WA 98587

Re: County Authority on Indian Reservations

Dear Mr. Wells:

This letter is to verify in writing that the county does not have authority over lands within the Indian reservation with regard to land use regulations and building permits. If you have any further questions please call again.

Sincerely,

/s/ Rachel Nathanson
Rachel Nathanson
Senior Planner

RN:mkg

JOHN D. SPELLMAN
County Executive

King County Courthouse
Seattle, Washington 98104
(206) 344-4040

May 16, 1979

MEMORANDUM

TO: Department Directors

FR: John D. Spellman

SUBJECT: MUCKLESHOOT INDIAN RESERVATION

I have been asked by the Muckleshoot Indian Tribe to indicate, for all concerned, what our policy is with regard to cooperation with the Tribal Government and procedures for handling land use issues on the Reservation.

We want to cooperate with the Tribal Government on all land use planning and related issues and lend technical assistance as it further develops its policies and approaches to deal with growth and development on the Reservation. This can be mutually beneficial as certain land development actions on the Reservation can affect us and certain actions off of the Reservation can affect the Tribe.

Currently, the Building & Land Development Division refers applicants proposing land development activities on the Reservation to the Tribal Offices for processing. This should continue and apply to all land development activities. For some types of activities, such as hydraulics reviews, we may need to provide technical assistance to the Tribal Government in carrying out the proper reviews. We want to continue to have a good working relationship between King County and the Muckleshoot Indian Tribe.

Your cooperation in ensuring a successful relationship is appreciated.

/s/ John D. Spellman

JDS:ckl

INTRODUCED BY: GARY GRANT

PROPOSED NO. 88-175

February 22, 1988

Motion No. 7129

A MOTION defining intergovernmental cooperation between King County and the Muckleshoot Indian Tribe for the development of the Enumclaw Community Plan, establishing King County as the jurisdiction primarily responsible for developing the community plan and providing the Muckleshoot Indian Tribe with opportunities to advise King County during the community plan's development.

WHEREAS, the Muckleshoot Indian Tribe is a federally recognized Indian tribe, and

WHEREAS, the Muckleshoot Indian Reservation, established in 1856 by Article VI of the Medicine Creek Treaty and enlarged to its present boundary by Executive Order in 1874, is the only federally recognized Indian reservation within the area encompassed by King County, and

WHEREAS, King County refers applicants proposing land development activities on that part of unincorporated King County which is within the reservation to the Muckleshoot tribal offices for processing pursuant to an executive memorandum issued by the King County executive on May 16, 1979, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize the opportunity for and advantages of cooperating in developing the Enumclaw Community Plan because the Enumclaw planning area is under King County's jurisdiction and partially within the Muckleshoot Indian Tribe's comprehensive planning area, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that intergovernmental cooperation is necessary to achieve a desired consistency between the Enumclaw Community Plan, King County Comprehensive Plan and the Muckleshoot Indian Reservation Comprehensive Plan, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that intergovernmental planning will more likely produce a community plan which effectively manages growth and development, protects natural resources, provides public facilities and services and stimulates economic development, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that intergovernmental cooperation will increase the efficiency and reduce the costs of planing for the area because it will prevent duplicating the efforts of the two jurisdictions and their citizens, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that interjurisdictional planning will promote a more predictable and certain process and produce more understandable and long-lasting policies for residents, property owners, developers and other agencies and jurisdictions, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that interjurisdictional cooperation

will increase the visibility of their planning efforts, making their decision-making more understandable to the public, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that by sharing knowledge, information and resources, they will better understand each other's interests, concerns and needs in those areas in which they have a mutual interest, and

WHEREAS, King County and the Muckleshoot Indian Tribe recognize that intergovernmental cooperation throughout the Enumclaw Community Plan's development and adoption will lay the foundation for future cooperation in land use and capital improvement project planning, development review and natural resource protection;

NOW, THEREFORE, BE IT MOVED by the Council of King County:

A. The King County parks, planning and resources department, which is responsible for developing the Enumclaw Community Plan, should seek the Muckleshoot Indian Tribe's participation in the planning process. The Muckleshoot Indian Tribe's participation may include such actions as:

1. Serving on the Technical Advisory Committee;

2. Serving on the Citizen Advisory Committee;

3. Commenting on data, land use alternatives and, finally, the Draft Enumclaw Community Plan before the plan is submitted to the King County executive or county council;

4. Commenting on proposed capital improvement projects in the draft plan before the plan is submitted to the King County executive or county council;

5. Working with King County planners to resolve differences between the two jurisdictions before the draft plan is submitted to the King County executive or county council;

6. Commenting on the King County Executive Proposed Enumclaw Community Plan's policies, land use, area zoning and capital improvement projects when the county council reviews the plan.

PASSED THIS 21st day of March, 1988.

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

/s/ Gary Grant
Chairman

ATTEST:

/s/ Gerald A. Peterson
Deputy Clerk of the Council

TRANSCRIPT OF RECORD
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 272

EDWIN T. MORRIS, EDLAR B. BLANTON, WILLIAM G. MAXWELL, PHILIP S. WITHERSPOON, ISAAC H. HARNESS, THOMAS PEERY, R. L. GLOVER, J. B. SPRAGINS, C. M. KEYES AND MILTON F. IKARD, APPELLANTS

vs.

ETHAN A. HITCHCOCK, WILLIAM A. JONES, J. GEORGE WRIGHT AND J. BLAIR SHOENFELT

Appeal from the Court of Appeals of the District of Columbia

FILED MAY 5, 1903

(18,918)

In the Court of Appeals of the District of Columbia

Edwin T. Morris et al., Appellants,	)	
vs.	)	No. 1273.
Ethan A. Hitchcock et al.,	)	

Supreme Court of the District of Columbia.

Edwin T. Morris, Edlar B. Blanton, William G. Maxwell, Phillip S. Witherspoon, Isaac H. Harness, Thomas Peery, R. L. Glover, J. B. Spragins, C.M. Keyes, and Milton F. Ikard, Complainants,	)	No. 23477. In Equity.
vs.	)	
Ethan A. Hitchcock, William A. Jones, J. George Wright, and J. Blair Shoenfelt.	)	

United States of America,)
) ss:
District of Columbia.)

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill of Complaint.

Filed August 19, 1902. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Edwin T. Morris et al.,	)	Equity.
vs.	)	
Ethan A. Hitchcock et al.,	)	No. 23477.

The bill of complaint of Edwin T. Morris, Edlar B. Blanton, William G. Maxwell, Phillip S. Witherspoon, Isaac H. Harness, Thomas Peery, R. L. Glover, J. B. Spragins, C. M. Keyes and Milton F. Ikard, plaintiffs, against Ethan A. Hitchcock, William A. Jones, J. Geo. Wright and J. Blair Shoenfelt, defendants, complains and says:—

I. That plaintiffs and defendant—are citizens of the United States and not members of any tribe of Indians, and that plaintiffs, Morris, Blanton, Maxwell and Witherspoon are residents of Gainesville, Cooke county, Texas; that plaintiffs Peery, Glover, Harness and Ikard are residents of the town of Chickasha in the Chickasaw nation, Indian Territory; that plaintiff Spragins is a resident of the town of Ardmore in said nation and that the plaintiff Keyes is a resident of Kansas City, in the State of Missouri; and that plaintiffs sue in their own right, and for their own use and benefit, and for the use and benefit of all others owning and holding cattle and horses in said Chickasaw nation upon like terms and conditions as the plaintiffs.

II. That defendant—Hitchcock and Jones are residents of the District of Columbia, and that the defendants Wright and Shoenfelt are residents of the city of Muscogee, in the Indian Territory, but can be found in said District of Columbia; and that said defendants are officers of the United States, the defendant Hitchcock being Secretary of the Department of the Interior, the defendant Jones Commissioner of Indian Affairs, the defendant Wright Indian inspector and the defendant Shoenfelt United States Indian agent at said city of Muscogee.

III. That each of the plaintiffs is the owner of cattle and horses, and one of them owning less than five hundred head, and some of them owning exceeding one thousand head, situated and grazing upon land in said Chickasaw nation under contract with individual members of the Chickasaw tribe of Indians, which land is, and has been, held, used, and claimed by such individual Indians as their approximate share upon allotment, which cattle and horses are so held upon terms satisfactory to the individual Indians claiming such lands; the bulk of which cattle and horses were bred and raised in said nation, and have never been elsewhere, and many of them were acquired by plaintiffs by purchase from members of said tribe, but some of said cattle and horses have been introduced into said nation during the present year, and that there are now exceeding one hundred thousand cattle and horses located in said nation and owned and held by citizens of the United States, not members of said tribe, upon like terms and conditions as plaintiffs' cattle and horses are so held, which cattle and horses exceed in value the sum of fifteen dollars per head.

IV. That there is not now, and for the last four years there has not been, any public domain in said nation, but practically all of the lands in said nation have been, and are now, enclosed, claimed and occupied by individual members of said tribes as their approximate share upon allotment, and over the lands so enclosed and held the tribe is, and has been, without jurisdiction or control.

V. That the legislature for said tribe on May 3rd, 1902, enacted the pretended statute entitled "An act to prescribe privilege or permit taxes and define the manner

of their collection," thereby seeking to impose an annual tax of twenty-five cents per head upon all cattle and horses in said nation not belonging to members of the tribe, which statute is set forth in the regulations herewith filed, marked "Exhibit A" and made a part of this complaint; and thereafter, on the 3rd day of June, 1902, Honorable Thomas Ryan, acting Secretary of the Interior, wrongfully seeking to put said statute in force, promulgated in behalf of the Interior Department the regulations set forth in said exhibit; which pretended tax the plaintiff and other citizens of the United States have refused, and still refuse, to pay, because they believe the same to be illegal and unauthorized.

VI. That plaintiffs are advised and believe that said Chickasaw legislature is without dominion or jurisdiction over the person or property of plaintiffs and said other citizens of the United States, who are not members of said tribe, and is without power to enact laws controlling the action of any one except a member of the tribe, and that for the last fifty years said tribe has been without jurisdiction or power to impose taxes or burdens upon any one not a member of the tribe; and that plaintiffs and other citizens of the United States residing or holding cattle and horses in said nation are amenable to the laws of the United States enforced therein, but no other or different laws, and are entitled to all of the rights guaranteed by the Constitution of the United States, and they are therefore advised and believe that the aforesaid statute is illegal and void and a wrongful attempt upon the part of the Chickasaw Indians to usurp and exercise legislative jurisdiction and dominion over persons in no manner subject to their jurisdiction; and the plaintiffs are in like

manner advised and believe that defendant Hitchcock, as Secretary of the Interior, is but a ministerial officer, clothed with no power to legislate or to impose taxes or burdens, or to enforce the same when imposed, and that the seizure and removal of the cattle and horses of plaintiffs and other citizens of the United States without warrant or judicial investigation, or opportunity for the same, as contemplated in said regulations, is, and would be, illegal and repugnant to the fourth and fifth amendments to the Federal Constitution.

VII. That the defendants, combining and confederating, together are proceeding to enforce said statute and regulations, and are threatening to forcibly seize, hold, and drive and remove the cattle and horses of plaintiffs and said other citizens of the United States from said Chickasaw nation, thereby not only disregarding the rights of plaintiffs and said other citizens, but breaking and invading the close of the individual members of said tribe, and interfering with his use, possession and enjoyment of his approximate allotment and depriving him of his right to use the same in such a manner as in his judgment best promotes his individual interests, but the defendants wrongfully seeking justification for said statute and regulations pretend that as said cattle and horses graze upon lands in the Chickasaw nation, the plaintiffs and other citizens of the United States are under moral obligation to pay the tribe for the use of said land; but plaintiffs say this pretense is unfounded, for the payment of said pretended tax confers no right to either grass or water, and that in order to obtain grass and water for said cattle, plaintiffs and said other citizens of the United States have been forced to pay and do pay the individual Indian claim-

ant the full market value of the use and possession of said lands, and that said statute and said regulations are not attempts to obtain value for anything given or received, but are enacted and promulgated upon the erroneous assumption that the Chickasaw legislature and the Secretary of the Interior are clothed with the full power of legislation, with the right to impose such burdens as they deem fit upon those who are not members of said tribe, and to enforce them by arrest and seizure without warrant and by banishment and removal without judicial hearing or trial, or such other unrepublican and despotic methods as they may desire to employ;

VIII. That the enforcement of said statute and regulations in the manner aforesaid would not only result in a multiplicity of suits and almost endless litigation, but would injure said cattle and horses, and deprive them of water and grass and throw them upon the hands of their owners at a time when they have no means of caring for the same, or providing them with feed or pasture, thereby forcing such owners to dispose of said cattle and horses at a ruinous sacrifice and when they are not in a condition to be marketed, and when there is little or no demand therefor, and thereby plaintiffs and said other citizens of the United States similarly situated would suffer irreparable loss and damage, for which they have no adequate remedy at law.

Wherefore the plaintiffs pray that the defendants, their agents and attorneys, be restrained and enjoined from seizing, molesting or removing the cattle and horses of plaintiffs and said other citizens of the United States located in said Chickasaw nation under or by virtue of

said statute and regulations, and upon final hearing plaintiffs pray that said injunction be made perpetual, and that said statute and regulations be adjudged void, and that they may have such other and further relief as they are entitled to; to which end plaintiffs pray that process may issue requiring the defendants to appear and answer the exigencies of this bill.

RALSTON & SIDDONS,
DAVIS & GARNETT,

Attorneys for Plaintiffs.

The defendants to this bill are Ethan A. Hitchcock, William A. Jones, J. Geo. Wright and J. Blair Shoenfelt.

The State of Texas,)
County of Cooke,)

Edwin T. Morris, one of the plaintiffs, being first duly sworn, on oath deposes and says: that he has read the foregoing bill of complaint and knows the contents thereof, and that the facts therein stated upon his personal knowledge are true, and those stated upon information and belief he believes to be true.

EDWIN T. MORRIS.

Sworn to and subscribed before me this the 16th day of August, 1902.

S. W. GLADNEY,

[SEAL.] *Notary Public for Cooke County, Texas.*

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1903.

EDWIN T. MORRIS,
EDLAR B. BLANTON,
WILLIAM G. MAXWELL,
PHILLIP S. WITHERSPOON,
ISAAC H. HARNESS,
THOMAS PEERY,
R. L. GLOVER,
J. B. SPRAGINS,
C. M. KEYS,
MILTON F. IKARD,

No. .....

Appellants,

vs.

ETHAN A. HITCHCOCK,
WILLIAM A. JONES,
J. GEORGE WRIGHT,
J. BLAIR SHOENFELT,

Appellees.

Appeal from the Court of Appeals for the District of Columbia.

BRIEF FOR APPELLANTS.

STATEMENT.

On May 3rd, 1902, there was enacted by the Legislature for the Chickasaw Tribe of Indians a Statute entitled "An act to prescribe privilege or permit taxes and defining the manner of their collection." The act, in substance, provides that upon all live stock held in the Chickasaw Nation by non-citizens, there should be paid annually a tax of twenty-five cents per head on cattle, horses and mules and five cents per head on sheep and goats, payable to such person or persons and collected under such rules and regulations as may be prescribed by the Secretary of the Interior, the expense to be deducted from the gross collections and the net balance paid quarterly to the Treasurer of the Chickasaw Nation. If the taxes are not paid when demanded, such live stock to be in the Chickasaw Nation without its consent and unlawfully upon the lands of the Chickasaws, and the presence of such stock and their owners or holders deemed detrimental to the peace and welfare of the Indians. This Statute was approved by the President on May 15th, 1902. The Hónorable Thomas Ryan, acting Secretary of the Interior, on June 3rd, 1902, promulgated certain regulations for the enforcement of the above statute. These regulations, in substance, re-enact the statute and provide that the tax shall apply to all live stock held by any person other than a recognized citizen of the tribe; that the taxes should be paid to the Indian Agent at Muskogee annually on the 1st day of January prior to the introduction of such stock, and that the regulations and taxes should apply to all stock held within the limits of the Chickasaw Nation by other than recognized members of the tribe,

whether held upon the public domain or upon lands leased from individual Indians.

The appellants are citizens of the United States having cattle and horses within the Chickasaw Nation upon lands leased from individual Indians and held by them as their approximate shares upon allotment. The bulk of the cattle so owned by them were bred in the Chickasaw Nation and many of them acquired by purchase from members of the tribe, and none of such cattle were introduced into the Nation subsequent to January 1st, 1902.

The complaint was filed in the Supreme Court for the District of Columbia on August 19th, 1902, by the appellants sueing in their own behalf and in behalf of all owners of livestock similarly situated to enjoin the Secretary of the Interior, the Commissioner of Indian Affairs, the United States Indian Inspector and the United States Indian Agent at Muskogee from seizing and removing the cattle and horses of the appellants and other owners of live stock from the limits of the Chickasaw Nation for the non-payment of said taxes. In the complaint the validity of the Chickasaw Statute, the regulations of the Interior Department and the seizure and removal of said cattle were called in question upon the grounds hereinafter assigned. The defendants appeared and demurred to the complaint upon the following grounds:

1st. The court has no jurisdiction over the subject matter of the suit.

2nd. There is a fatal defect of parties to the bill in that the Chickasaw Nation or tribe, nor any member or representative thereof, is not made a party thereto.

3rd. The bill of complaint is bad in substance and does not state facts sufficient to entitle the complainants, or either of them, to the relief prayed for or to any relief.

The court overruled the first and second demurrers, but sustained the third and dismissed the bill. In sustaining the demurrer, the court held in substance that said Statute and regulations were valid and the threatened seizure and removal of the cattle a lawful exercise of authority upon the part of the Secretary of the Interior, but held that the bill was sufficient to entitle the plaintiffs to an injunction provided the threatened seizure and expulsion were unlawful. The case was appealed to the Court of Appeals for the District of Columbia, and was there affirmed in a written opinion substantially sustaining the opinion of the trial court; and the case has been appealed to this court.

ASSIGNMENT OF ERROR.

The appellants claim that the Court of Appeals for the District of Columbia in affirming said judgment committed error as follows:—

1st. In holding the Chickasaw Statute of May 3rd, 1902, to be valid, when the same should have been held invalid and void, because an encroachment upon the exclusive power of Congress under the Constitution to regulate commerce with the tribe.

2nd. In holding the Chickasaw Statute of May 3rd, 1902, to be valid, when the same should have been held invalid and void, as being a wrongful attempt upon the part of the Chickasaw Legislature to usurp legislative dominion and jurisdiction over the persons and property of citizens of the United States not members of the tribe, which jurisdiction the tribe does not, and never did, possess.

3rd. In holding the regulations promulgated by the Honorable Thomas Ryan on June 3rd, 1902, in behalf of the Interior Department, to be valid, when the same should have been held to be invalid and void, as a wrongful attempt upon the part of an executive officer to usurp power of legislation vested alone in Congress.

4th. In holding said Chickasaw Statute of May 3rd, 1902, and said regulations of June 3rd, 1902, as valid, when the same should have been held invalid and void, because repugnant to the Fourth and Fifth Amendments to the Constitution of the United States.

5th. In holding that the provisions of the Treaties of 1855 and 1866 with the Choctaw and Chickasaw Indians in reference to intruders are still in force, and not superseded or abrogated by the Atoka Agreement and the Curtis Bill and other subsequent legislation inconsistent therewith conferring upon citizens of the United States, not members of the Chickasaw Tribe, the right to reside and hold property in the Chickasaw Nation.

6th. In holding that Sections 2147 and 2149 of the Revised Statutes are still in force and applicable to conditions existing in the Chickasaw Nation.

7th. In holding that Sections 2147 and 2149 of the Revised Statutes are valid, when the same should have been held to be invalid, and repugnant to the Fourth and Fifth Amendments to the Constitution of the United States.

8th. In holding that said regulations of June 3rd, 1902, are not inconsistent with Section 2117 of the Revised Statutes, in which Congress expressed its will upon the subject, and prescribed the procedure.

9th. In holding that the Secretary of the Interior, an executive officer of the United States deriving all of his authority under its laws, has the right or power as such to enforce the Chickasaw Statute of May 3rd, 1902.

10th. In not holding that the Act of Congress knows as the Curtis Bill and the Atoka Agreement took from the tribe the control of the agricultural and grazing lands and conferred upon the individual Indian the right to the

possession, use and enjoyment of his approximate share free from interference of the tribe in like manner as it took from the tribe the control of the mineral lands and placed them under the exclusive control of the Secretary of the Interior.

* * *

"The power to tax," says Mr. Cooley in his Principles of Constitutional Law, "is an incident of sovereignty and is co-extensive with the subjects to which that sovereignty extends." The power to tax, it is conceded, arises from the duty of protection; and the right of taxation and the duty of protection go hand in hand.

It is claimed that this tax is needed to maintain the tribal government and the Indian schools. None but Indians are subject to the tribal government, and none but Indian children can attend the schools. The so-called government and schools are maintained for the exclusive benefit of Indians. Those who enjoy the benefits of government should bear the burdens.

The Court of Appeals, without apparently intending to be sarcastic, speaks of non-citizens and their property being within the limits of the tribal government, enjoying its benefits and protection. It is not possible to point to the protection or benefit the non-citizen receives directly or indirectly from the tribal government. If it should be deemed necessary to tax the five hundred thousand white inhabitants of the Indian Territory to maintain tribal governments and schools, who should be the judge of the necessity for this tax and the amount of the same? What government has the power to impose burdens and restrictions and to regulate the conduct of white citizens of the United States in the Indian Territory? To what government do these citizens owe allegiance and duty?

To what laws are they amenable? If these citizens are to be taxed, not for their own benefit, but for the benefit of others, what power should prescribe the tax? Can it be said that these tribal governments can impose whatever burdens they deem fit upon men and their property, not belonging to the tribe; and that the Secretary of the Interior can coerce payment by whatever arbitrary methods he may be pleased to adopt? If these things can be done, there certainly exist remarkable conditions in the Indian Territory. If this tax be lawful, it is surrounded with none of the usual safe-guards. Those who impose the burden do not carry any part of it, and those who pay the tax receive no benefit. It is not a tax but spoliation.

See Arnd vs. Union Pac. R. R. Co., 120 Fed. 915.

But it is said the cattle and horses are upon the tribal lands without the consent of the tribe, and that this is an intrusion which the United States, under the provisions of the treaties, Supra, is under obligation to prevent.

Be this as it may. It is the province of Congress to enact laws and provide means for fulfilling the treaty obligations of the government. It is not for the Secretary of the Interior to say what is or is not an intrusion, and to abate it by any means he may see proper to adopt. Congress has enacted the laws, necessary in its judgment, to fulfill the treaty obligations. If the laws be deemed inadequate, an appeal should be made to Congress for additional legislation.

Under Section 2117 of the Revised Statutes, any person who drives or in any wise conveys any stock

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brought within the jurisdiction of the court. The issue did not call for any serious consideration of Sections 2147 and 2149. If the agent acted in good faith, the removal was not fraudulent, though it may have been wrongful. The Court of Appeals seems to think that as the Statutes of Arkansas were subsequently put in force in the Indian Territory, the former decisions of the Supreme Court of Arkansas construing United States, not Arkansas Statutes, are entitled to peculiar weight. We do not think the premises justify the conclusion.

In order to understand just how well the Arkansas Supreme Court understood conditions in the Indian Territory, Carter vs. Good, 50 Ark. 719, should not be overlooked. There, while two citizens of Arkansas were journeying through the Indian Territory, one of them wrongfully appropriated the other's horse. After their return home, the owner sued the wrong-doer for the value of the horse. The Supreme Court held that he had no cause of action because the conversion took place in the Indian Territory.

The act of June 30, 1834, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers and the provisions of the treaties of 1855 and 1866 with the Choctaw and Chickasaw Indians relative to intruders, are not now in force in the Chickasaw Nation, or applicable to conditions existing there; but have been repealed by subsequent and inconsistent legislation.

So far we have treated the question as though the Act of June 30th, 1934, and the Treaties of 1855 and 1866 were in force. There are now within the Chickasaw Nation probably one hundred and fifty thousand white inhabitants

and probably eight thousand persons claiming to be Indians, but half of them are of mixed blood, or what are known as 'intermarried citizens.' There are many towns and cities in the Chickasaw Nation incorporated under the laws of the United States in which under the 14th Section of the Curtis Bill all of the inhabitants, without regard to race, are entitled to equal rights, privileges and protection. The Indians are citizens of the United States and qualified jurors in the federal courts, and compete with their white fellow citizens for the various federal offices. Practical partition has been made of the surface of the land. Each Indian is entitled to the use of his approximate share, with the right to lease it to whom he pleases, including white men. The inhabitants of the Chickasaw Nation, none of whom may be Indian, may incorporate for operating and maintaining therein electric roads, telephone and telegraph lines, bridges, turn-pikes, mining and manufacturing enterprises, banking, and the various other purposes for which it is usual to incorporate. 31 S. at L. 795, Sec. 8. Corporations chartered by other states may transact business in the Chickasaw Nation upon filing a power of attorney of South McAlester creating an agent with power to accept service. Members of the tribe are merchants and carry large stocks of clothing, hardware and other merchandise. The Indians and whites mingle in daily intercourse, and traffic and trade as in other sections of the Union. The civil and criminal laws of the State of Arkansas have been put in force in the Chicasaw Nation, and all inhabitants, including Indians, are subject thereto. The tribal government has been stripped of about all of its power, even over the members of the tribe, and is merely continued in existence for the

purpose of perfecting the allotment of lands. In most matters the United States deals directly with the individual Indian, and not with the so-called government. These are certainly conditions not contemplated by the Act of June 30th, 1834, or by the Treaties of 1855 and 1866.

In United States vs. Cisna, 1st McLean 254, it was held that the Act of June 30th, 1834, was intended to apply to a country inhabited almost exclusively by Indians, where there was but little, if any, intercourse by the Indians with white people; and of necessity could not, and did not apply in a country having a considerable white population, and in which the Indians and whites mingled, traded and trafficked in daily intercourse.

It must be conceded that a foreigner can not be prosecuted for travelling through the Chickasaw Nation without a passport, and that the owner of cattle does not commit a felony in shipping his property to the market. It must be conceded that a white man in the Chickasaw Nation may lawfully buy clothing, hardware, stoves and cooking utensils from an Indian merchant. If he should refuse to pay for them when bought, he could not avoid the debt by pleading that the purchase was in violation of law or against public policy. The defendants must concede this much. Yet, it is contended that in the incorporated cities of the Chickasaw Nation where the Constitution is in force and courts are sitting with jurisdiction to redress all grievances, the Indian office can extort money by threatening to kidnap a citizen, and can arbitrarily invade the home of a citizen, close his place of business and practically confiscate his property. This is more absurd than the prosecution of a foreigner for travelling without a passport. It is contended that the Indian office can lawfully

issue an order to a lieutenant of Indian police directing him to remove from the Chickasaw Nation all cattle held there in violation of the Act of May 3, 1902, specifying no particular cattle or the name of any owner, but leaving all these things to the discretion of the policeman. Now it is seriously contended that this is due process of law. It is also contended that the Interior Department can go into court and have the clerk enjoined from filing complaints in replevin, or issuing writs, and the marshal enjoined from executing the same; thus preventing the citizens from obtaining any relief against the threatened depredation of the policeman. Now it is claimed that the forced contribution of money by this method is due process of law. Justification for these acts can not be found in the right of Congress to regulate commerce with the Indian tribes. The Interior Department is not Congress. In regulating commerce with the Indian tribes, Congress must of necessity observe the other provisions of the Constitution. The same sentence confers upon Congress the right to regulate commerce with the several states, but in doing so, no man can be compelled in a criminal case to furnish evidence against himself in violation of another provision of the same instrument. Councilman vs. Hitchcock, 142 U. S. 547.

The same section confers upon Congress the right to exercise exclusive legislation in all cases whatsoever over the District of Columbia, but in so doing the other provision must be observed, and no one can be deprived of the right of a trial by jury in an action at law. Callan vs. Wilson, 127 U. S. 540. The same section confers upon Congress the right to lay and collect duties, imposts and excises, but in doing so Congress can not

violate other provisions and require the defendant to furnish evidence against himself in an action to recover a penalty. Boyd vs. United States, 116 U. S. 610.

Sections 2147 and 2149 were evidently enacted upon the theory that the Constitution of the United States was not in force in what was meant by the term "Indian country." It was a wild, unsettled country beyond the outposts of civilization, to which the judicial arm of the government had never extended, and in which there was nothing to indicate the authority of the United States except here and there a military post. There were no courts in the country or civil officers, and it was impossible to give practical effect to the constitutional guaranties. Certainly it can not be successfully contended that in reference to all matters which Congress is authorized to do, the citizen can be arrested without warrant and transported and banished without hearing, and his property seized, damaged and removed at the pleasure of an executive officer.

It is the contention of the defendants that the Commissioner of Indian Affairs can, without hearing, send a policeman to seize and remove from the Indian Territory a reputable white citizen, and that the effect of this exparte proceeding is to deprive him of the right to ever return to the Indian Territory, and to subject him to a penalty of one thousand dollars of he is ever found therein. They have arrested and removed, and thereafter sought to prosecute the mayors and aldermen of incorporated towns and the owners of town lots and other real estate. This, it is claimed, is due process of law.

It ought to be reasonably free from doubt that the provisions of the Treaties of 1855 and 1866 in reference to

intruders have been repealed by subsequent and inconsistent legislation.

Ward vs. Race Horse, 163 U. S. 511.

The Cherokee Tobacco, 11 Wallace 616.

The policy as manifested by the Treaties of 1855 and 1866 was to prevent strife between the white man and the Indian by forcing them to live separate and apart. It was not contemplated that the Indian Territory should ever be incorporated into any state. It was unlawful for any white man to live in the Indian Territory, unless he was an officer or employee of the government, or came under some of the specified exceptions.

The policy of the government has since, from necessity, undergone a radical change. It is not now the policy of Congress to exclude white men from the Indian Territory; but it is the manifest policy of the government to admit the territory into the Union as a state at no distant day.

This policy is wholly inconsistent with the policy manifested by the old treaties. The Curtis Bill and the Atoka Agreement expressly provide for white people residing in the Chickasaw Nation. They are permitted to buy and to own land, to incorporate towns, maintain municipal government, to levy taxes and to maintain public schools. Throughout the Curtis Bill and the Atoka Agreement white men are recognized as being lawfully in the Chickasaw Nation. If the consent of the Indians be necessary, that consent is given in the Atoka Agreement. If the Chickasaw Legislature should demand that the incorporated cities be abolished and the white inhabitants banished, would the government be under any treaty obligation to do so? There is nothing more absurd than the contention that all white men in the Chickasaw Nation, except government employees, are intruders, and must year by year obtain the consent of the Indians to their being there.

(SEAL)

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February 10, 1983

No. 8138

This opinion is issued in response to a request from the Honorable Bob Harper, State Representative.

FIRST QUESTION PRESENTED

Do the Confederated Tribes of Umatilla County have power to enact a land use code for the reservation which would supersede all state and county regutions as they apply to Indians and non-Indians alike?

ANSWER GIVEN

Under the facts presented to us it is probable that the Confederated Tribes' retained sovereignty includes the exclusive right to promulgate and apply a land use code to all lands within the "diminished reservation." For Indian trust lands outside the diminished reservation, but within original treaty boundaries, the tribes retain exclusive authority to apply a land use code to such lands. With respect to non-Indian fee lands outside the diminished reservation but within the original 1855 treaty boundaries, the answer depends upon factual circumstances as they bear upon the Confederated Tribes' sovereign interest in protecting their political integrity, their economic security and their health or welfare.

SECOND QUESTION PRESENTED

Will the constitutional rights of non-Indians who either reside in the area or own property in the area be violated because they are not proportionately represented in developing such a land use code?

ANSWER GIVEN

No.

DISCUSSION

INTRODUCTION

The issue raised by this opinion request is the power of the Confederated Tribes of the Umatilla Indian Reservation (Confederated Tribes) to adopt and apply land use regulations to non-Indian fee lands within the reservation. Before addressing this question directly we first examine some history and the physical status of the reservation.

In 1855 the Cayuse, Umatilla and Walla Walla Indians entered into a treaty with the United States. Under this treaty the Indians ceded all their right, title and claim to every part of the country claimed by them to the United States. As part of the treaty, the United States set apart and marked for the exclusive use of the Indians a portion of the land so ceded as an Indian reservation. The treaty was ratified by the President on April 11, 1859. 12 Stat. 945.

Thereafter, under the Act of March 3, 1885, 23 Stat. 340, the United States authorized the allotment of certain agricultural lands to the Indians residing upon the Umatilla reservation. It was further provided in that Act that before any allotment would be made, a commission of three disinterested persons appointed by the President would go upon the reservation, take a census of the In-

dians who would remain on the reservation and be entitled to take lands in severalty thereon and determine and set apart for the Indians the amount of lands required to make the necessary allotments. Certain other lands were also to be set apart for an industrial farm and school. The commission was to file a report with the Secretary of Interior indicating the number and classes of persons entitled to allotments and describing the tract selected for them. If the Secretary approved the report, "the said tract shall thereafter constitute the reservation for said Indians." 23 Stat. 341. It was also provided that the residue of the original reservation not included within the new boundaries would be sold, with the net proceeds after expenses and reimbursement of individual Indians for Indian-owned improvements placed in the treasury to the credit of the Indians.

Thereafter, such a commission was appointed on August 13, 1887 and selected a tract for a reservation containing in the aggregate 119,364 acres. The Indians, however, were not happy with the tract selected. Accordingly, the Act providing for the allotment of agricultural lands to the Indians (23 Stat. 341) was amended to provide for as much additional lands in the reservation selected as would enable the Secretary "to fix, define, and establish the metes and bounds of said reservation tract in a satisfactory manner," and to include therein such portions "as he may deem advisable of certain lands in the eastern part of the reservation" and "to establish such diminished reservation accordingly . . . ." 25 Stat 559-560.

Thereafter, by Executive Order approved October 17, 1888, the Secretary of Interior, pursuant to the aforesaid Acts

> "ordered that so much of the existing Umatilla Indian Reservation in the State of Oregon, as lies within the following-described metes and bounds, *is hereby declared to be, and is, established as the diminished reservation required by the act of March 3, 1885,* as amended by the act of October 17, 1888, to be selected and set apart to constitute the reservation for the confederated bands of Cayuse, Walla Walla, and Umatilla Indians for the purposes specified in the said act of March 3, 1885 . . . ." I Kappler, *Indian Affairs, Laws and Treaties,* p 893 (2d ed 1904). (Emphasis added.)

Thereafter, pursuant to the Allotment Act of 1887, 24 Stat 388, the Secretary of the Interior allotted lands within the reservation in trust to the Confederated Tribes and to individual Indians. All of the allotted lands which the Confederated Tribes or individual Indians continue to occupy are held in trust by the United States for the Indians. These lands are referred to in this opinion as Indian Trust Lands.

Under the same Act, the Secretary of Interior also issued fee patents to lands within the reservation to non-Indians. In addition, some Indians within the reservation leased or deeded their lands to non-Indians. Thus, approximately 55 percent of the reservation land is currently held by non-Indians. These non-Indian lands within the reservation are referred to in this opinion as non-Indian fee lands. (FN1)

Throughout the diminished reservation non-Indian fee lands are closely interspersed with Indian Trust Lands. Outside the diminished reservation within the original treaty boundaries, there are some Indian Trust Lands and

large amounts of non-Indian fee lands isolated from the Indian Trust Lands.

In 1973, the Confederated Tribes adopted an interim zoning ordinance applying to all lands within the diminished reservation. (FN2) This was followed by a comprehensive plan in 1979.

By agreement between the county and the Tribes the Tribes' land use regulations are applied to all lands within the diminished reservation, both Indian and non-Indian alike. In the case of routine permits involving non-Indian fee lands, the Indian Development Office acts as the agent for the county for processing the permits. For discretionary permits such as conditional use permits, the Tribes through their Board of Trustees hear applications for permits applicable to Indian Trust Lands and the county through its hearings officer acting as an extension of the county planning commission hears applications involving non-Indian fee lands.

The Confederated Tribes have proposed a land use code (a zoning ordinance) which would supersede the existing interim zoning ordinance and all state and county land use regulations for the area. The code has not yet been adopted and will not be adopted until the Confederated Tribes schedule and complete several more hearings concerning the code. As directed the code would apply to all lands within the original 1855 treaty boundaries. (FN3)

The issue we deal with first is the power of the Confederated Tribes to adopt a land use code applicable to all lands within the diminished reservation.

FIRST QUESTION PRESENTED

Power of the Confederated Tribes of Umatilla County to Adopt a Land Use Code

Before the coming of the Europeans, the Indian tribes were self-governing political communities. "Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws." *United States v. Wheeler,* 435 US 313, 322-323 (1978). However, the Indian tribes no longer have the full attributes of sovereignty.

> "Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others." *United States v. Wheeler, supra,* 435 US. at 323. (Footnote reference omitted.)

This quotation refers in part to an implicit divestiture of sovereignty. On this the Court said:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. . . . They cannot enter into direct commercial or governmental relations with foreign nations. . . . And, as we have recently held, they cannot try nonmembers in tribal courts. . . .
>
> "These limitations rest on the fact that *the dependent status of Indian tribes* within our territorial jurisdiction *is necessarily inconsistent with their freedom independently to determine their exter-*

nal relations." *United States v. Wheeler, supra,* 435 US at 326. (Emphasis added; citations omitted.)

Nevertheless the Court found a limited retained sovereignty within Indian tribes with respect to matters involving their own self-government, saying:

> "But our cases recognize that the Indian tribes have not given up their full sovereignty. . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler, supra,* 413 US at 323.

And in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 US 134 (1980), the Court in upholding the power of Indian tribes to impose cigarette taxes upon the on-reservation sale of cigarettes to nontribal purchasers, said:

> "Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. [Citation omitted.] In the present cases, we can see no overriding federal interest that would necessarily be frustrated by tribal taxation. And even if the State's interests were implicated by the tribal taxes, a question we need not decide, it must

> be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Reservation, supra,* 447 US at 153-154.

And *see also Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982) upholding the inherent power of an Indian tribe to impose a severance tax on oil and gas extracted and removed from tribal reservation lands by non-Indian lessees.

In *Montana v. United States,* 450 US 544 (1981), the Court quoted *United States v. Wheeler, supra,* with approval and recognized a limited retained tribal sovereignty saying:

> "Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana v. United States, supra,* 450 US at 564.

The court, however, was careful to point out the limits of this power, saying:

> "But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delagations." 450 US at 564.

The Court then amplified on the distinction between areas within and without tribal control saying:

> "The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, rejecting a tribal claim of inherent covereign authority to exercise criminal jurisdiction over non-Indians. Stressing that Indian tribes cannot

exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in *Fletcher v. Peck,* 6 Cranch 87, 147—the first Indian case to reach this Court—that the Indian tribes have lost any 'right of governing every person within their limits except themselves.' 435 U.S., at 209. Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition *that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.* A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citations omitted.] *A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.*" *Montana v. United States, supra,* 450 US at 565-566. (Emphasis added.) (Footnote references omitted.)

These cases establish the principles that (1) the Indian tribes still possess those attributes of sovereignty not withdrawn by treaty, statuts, or by implication as a necessary result of their dependent status, (2) this retained sovereignty generally gives the Indians the right to control their internal relations among themselves; however (3) that retained sovereignty includes the inherent power to exercise civil authority over the conduct of non-Indians on non-Indian fee lands within the reservation

only when that conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.

These principles were applied in the case of *Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation, Wyoming,* 670 F2d 900 (10th Cir 1982). In that case the issue was the validity of a tribal zoning ordinance adopted by the Shoshone and Arapahoe Indian Tribes and affecting fee lands owned by non-Indians and located within the Indian reservation. The district court ordered a partial summary judgment and a preliminary injunction requiring compliance with the zoning ordinance.

As in the instant situation the reservation consisted of land held in trust for the tribes and individual Indians and land owned by non-Indians. The appellants Knight, who were non-Indians, had prepared plats for a 32-lot subdivision within the reservation known as Big Wind Ranchettes No. 1 and a 100-lot subdivision to be called Big Wind Ranchettes No. 2. The Knights obtained local planning commission approval and proceeded to plat, subdivide and sell lots until the Indians brought their injunction suits. The court first dealt with the issue of the power of the tribes to control the use of fee lands by non-Indians:

> "The Developers argue that the Tribes have no authority to control the use of fee lands by non-Indians without a delegation by Congress of such power. We disagree. Indian Tribes have 'attributes of sovereignty over both their members and their territory.' *Merrion v. Jicarilla Apache Tribe,* — U.S. —, —, 102 S.Ct. 894, 903, 71 L.Ed.2d 21, 42 CCH S.Ct.

p. 1121, 1129, citing *United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 718, 42 L.Ed.2d 706. Included in the Tribal power is 'a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.' *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 152-153, 100 S.Ct. 2069, 2080-81, 65 L.Ed2d 10. Civil jurisdiction is distinguishable from the criminal jurisdiction over non-Indians which was denied in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 212, 98 S.Ct. 1011, 1022, 55 L.Ed.2d 209." *Knight v. Shoshone & Arapahoe Indian Tribes, supra,* 670 F2d at 902.

The court then considered whether a treaty or Congress had attempted to deal with this issue of the Indians' power, saying:

"In the situation presented no treaty provision is of any pertinence and Congress has not acted to delegate or deny the right to control use of non-Indian owned land located within the reservation. Denial of the right does not arise by implication as a necessary result of their [the Tribes] dependent status. See *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303; *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 1258, 67 L.Ed2d 1245, recognizes that: 'Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdictio nover non-Indians on their reservations, even on non-Indian fee lands.' *One proper form of the exercise of that power may be in response to 'conduct [which] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'* Id." *Knight v. Shoshone & Arapahoe Indian Tribes, supra,* 670 F2d at 902. (Emphasis added.)

The court noted that there was an absence of any land use control over lands within the reservation and that the interest of the tribes in preserving and protecting their homeland from exploitation justified the zoning code, saying:

"The executive branch expressly advised the Tribes that the ordinance could be enacted without BIA approval. Similarly, in 1900 the United States Attorney General advised the Secretary of Interior that certain tribes there considered could 'prescribe the terms . . . upon which they will permit outsiders to reside or carry on business in their territory.' 23 Op. Atty. Gen. 214, 216 (1900). See also opinion of Solicitor of the U.S. Interior Department quoted in *Merrion v. Jicarilla Apache Tribe,* — U.S. at —, n. 12, 102 S.Ct. at 906, n. 12, 42 CCH S.Ct. Bull., p. 1134 n. 12. The power to control use of non-Indian owned land located within the reservation flows from the inherent sovereign rights of self-government and territorial management. See *Merrion v. Jicarilla,* Id. — U.S. at —, —, 102 S.Ct. at 894, 901, at pp. 1121, 1125. The express positions of the executive and judicial branches and the implication fairly to be drawn from the lack of delegation or denial of this power by Congress, support the conclusion that the Tribes had the power to enact the zoning ordinance in question." *Knight v. Shoshone & Arapahoe Indian Tribes, supra,* 670 F2d at 903.

The court, however, appeared to retain jurisdiction for the future as to any attacks that might be made on the application and enforcement of the tribal zoning ordinance. 670 F2d at 904.

In a somewhat similar situation, in *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Namen,* 665 F2d 951 (9th Cir 1982), *cert den*

103 S.Ct. 314 (1982), Indian tribes attempted to regulate the manner in which non-Indians who owned land on the reservation bordering Flathead Lake, a navigable lake, exercised their riparian rights. The tribes claimed beneficial title to a portion of the lake and sought to enforce an ordinance they had enacted in 1977 to regulate both existing and future structures on the bed and banks of the sourt half of Flathead Lake.

The court held that the bed of the south half of Flathead Lake was owned by the United States in trust for the tribes and that the tribes had the power to regulate the federal common law riparian rights of non-Indians owning reservation land bordering the area:

"Even if the *Montana rule*—divestiture of all powers not necessary 'to protect tribal self-government or to control internal relations'—is applied to the instant case, we belive that the Tribes should prevail on the regulatory issue. We reach this conclusion for two distinct reasons.

"First, the *Montana* Court explicitly affirmed this circuit's holding that the Crow Tribe had the power to 'prohibit non-members from hunting or fishing on land belonging to the Tribe *or held by the United States in trust for the Tribe,*' or to regulate such hunting and fishing if it permitted those activities. 101 S.Ct. at 1254 (emphasis added). In the instant case, the Tribes are in effect seeking to regulate non-Indians' use of tribal trust land, since the exercise by appellees of their riparian rights entails building wharves, breakwaters, and other structures out onto the bed and banks of the south half of Flathead Lake.

"Second, the *Montana Court* acknowledged certain exceptions to the general rule that tribes were divested of powers not necessary for self-government or internal relations. In particular, '[a] tribe may

also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.' 101 S.Ct. at 1258. *The conduct that the Tribes seek to regulate in the instant case—generally speaking, the use of the bed and banks of the south half of Flathead Lake—has the potential for significantly affecting the economy, welfare, and health of the Tribes.* Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources. *Hence the challenged ordinance falls squarely with the exception recognized in Montana.* [Footnote omitted.]" *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Namen, supra,* 665 F2d at 964. (Emphasis added.)

Both the *Knight* and *Namen* cases are significant because they apply the *Montana* principle of acknowledging the inherent power of a tribe to regulate non-Indian conduct on non-Indian fee lands within the reservation where such conduct has a direct effect on the political integrity, economic necessity or the health or welfare of the tribe.

In *Cardin v. De La Cruz,* 671 F2d 363 (9th Cir. 1982). *cert den* 103 S Ct 293 (1982), the court considered whether an Indian tribe could enforce its tribal code against a non-Idian owner of a grocery store which had dangerous and unsanitary conditions that violated tribal buildings, health and safety regulations. The court, citing *Montana, supra,* sustained the right of the tribe to impose its building, health and safety regulations on the grocery store because of the commercial relationships between the tribe and the store owner and because the

"conduct that the Tribe is regulating 'threatens or has some direct effect on . . . the health or welfare of the [T]ribe.'" *Cardin v. De La Cruz, supra,* 671 F2d at 366.

In the context of these recent cases, we note the court's holding in *United States v. Montana, supra,* that the Indian tribes did not have authority to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the tribe. In reaching that holding the Court said:

"But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. [Citations omitted.] Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74-05." *Montana v. United States, supra,* 450 US at 564-565. (Footnote reference omitted.)

One of the reasons for this holding, perhaps, was the fact that the Crow tribe was "a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." 450 US at 556. Other reasons were that the State of Montana had traditionally exercised near exclusive jurisdiction over hunting and fishing on non-Indian fee lands within the reservation, and the United States and the Indians had accommodated themselves to the state regulation; additionally, there was no indication that the state had abdicated or abused its regulatory responsibility so as to imperil the subsistence or welfare of

the tribe. *Montana v. United States, supra,* 450 US at 564 (n 13) and 566 (n 16 and text).

However, we note again the exception under which an Indian tribe does retain its inherent sovereign power

"to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [Citations omitted.]" *Montana v. United States, supra,* 450 U.S. at 566.

In the instant situation there are some differences from the *Montana* situation. For one, there is a recent history of agreement between the Tribes and the county under which the Tribes' land use regulations have been applied to both Indian Trust Lands and non-Indian fee lands within the diminished reservation. Thus unlike the *Montana* case, there is a recent history of Indian land use regulations applying to non-Indian fee lands within the reservation.

Secondly, and perhaps more importantly, in the portion of the reservation known as the diminished reservation, Indian and non-Indian ownerships are so thickly and closely interspersed that it is difficult to conceive how, as a practical matter, two distinct systems of land use regulation could effectively operate without serious and damaging conflicts.

This raises the issue as to what authority, if any, the county has to impose its land use regulations within the reservation.

Initially, the United States Supreme Court viewed an Indian reservation as a distinct nation within the laws of

the state would have no force and effect. *Worcester v. Georgia,* 31 U.S. [6 Pet.] 515, 561 (1832). But the court has moved away from this doctrine. In *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), the Court said:

> "Although '[g]eneralizations on this subject have become . . . treacherous,' *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973), our decisions establish several basic principles with respect to the boundaries between state regulatory authority and tribal self-government. Long ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries, [citations omitted]. At the same time we have recognized that the Indian tribes retain 'attributes of sovereignty over both their members and their territory.' [Citations omitted.] *As a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.* The status of the tribes has been described as 'an anomalous one and of complex character,' for despite their partial assimilation into American culture, the tribes have retained 'a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 173 (1973), quoting *United States v. Kagama,* 118 U.S. 375, 381-382 (1886)." 448 U.S. at 141-142. (Emphasis added.) (Footnote reference omitted.)

The Court went on to note that there were two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members saying:

> "Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, [sec] 8, cl. 3. [Citation omitted.] This congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. [Citations omitted.] Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' [Citations omitted.] The two barriers are independent because either, standing alone, can be sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' *McClanahan v. Arizona State Tax Comm'n, supra,* at 172, against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. at 142-143.

Thus, the court now analyzes the question of state law applicability within an Indian reservation in terms of federal preemption of state law or unlawful infringement by state law on the right of reservation Indians to make their own laws.

In this context the courts have not permitted local land use codes to be applied to Indian trust lands. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *cert. den.* 429 U.S. 1038 (1977); *United States v. County of Humboldt,* 615 F.2d 1260 (9th Cir. 1980). The courts have also construed the provisions of Public

Law 280, 28 U.S.C. sec. 1360, (FN4) as not intended to grant general civil regulatory control over Indians within the reservation. *Bryan v. Itasca County,* 426 U.S. 373, 385, 390 (1976). (FN5)

Thus, as to Indian trust land within or without the diminished reservation, it is clear that the county has no authority to apply its land use regulations to such lands.

As to non-Indian lands within the diminished reservation, an analysis of whether the state or the county can regulate such lands within the reservation must focus on analysis of the issues of whether state (or county) authority has been preempted by federal law or whether state law would unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them. *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. at 142-143. The court applied this kind of analysis in *Crow Tribe of Indians v. State of Montana,* 650 F.2d 1104 (9th Cir. 1981), *opinion amended,* 665 F.2d 1390 (1982). That case was a suit for injunctive and declaratory relief by the Crow Indians against the State of Montana to enjoin the imposition by the state of revenue and gross receipts taxes upon coal mined from reservation lands by non-Indian lessees and from deposits held in trust for the Indians in lands outside the reservation. The Indians had imposed their own severance tax on coal mined within the reservation.

In determining that the Indians' complaint stated a cause of action, the court declared:

> "No express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy. [Footnote omitted.] On the other hand, legitimate interests of the state must be considered, and the ultimate result where the conduct of non-Indians on the reservation is involved depends on 'a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.' *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 149, 100 S.Ct. at 2586." *Crow Tribe on Indians v. State of Montana, supra,* 650 F.2d at 1109.

The court concluded that the tribe had made sufficient allegations to raise the possibility that the estate tax had been preempted by the Mineral Leasing Act of 1938, 25 U.S.C. secs. 396a-396g and the regulations promulgated thereunder, 25 C.F.R. sec. 171.1-.30 (1980).

The court then applied the self-government doctrine saying:

> "The accommodation of state and tribal interests is also central to the analysis of whether a state law infringes upon the right of reservation Indians to 'make their own laws and be ruled by them.' [Citation omitted.] The self-government doctrine differs from the preemption analysis in that it specifically prohibits state action that impairs the ability of a tribe to exercise traditional governmental functions such as zoning, [citation omitted] vehicle registration, [citation omitted] or the exercise of general civil jurisdiction over the members of the tribe, [citations omitted]. At base, however, the right of tribal self-government is a federal policy established by and subject to the will of Congress. Although self-government is related to federal preemption in the sense that preemption is considered in the context of the deeply ingrained traditional notions of self-government, the self-government doctrine is an independent barrier to state regulation." *Crow Tribe of Indians c. State of Montana, supra,* 650 F.2d at 1109-1110.

On this point the court concluded that the tribe's complaint stated a claim

> 'that the Montana taxes infringe on its right to govern itself. To support the claim at trial, the Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable." *Crow Tribe of Indians v. State of Montana, supra,* 650 F.2d at 1117.

See also, Cohen, *Handbook of Federal Indian Law,* pp 252-257 (1982).

The court's holding in *Crow Tribe* is consistent with *Montana v. United States, supra.* There the Court held that the tribe did not have the authority to apply its hunting and fishing ordinance to non-Indians on non-Indian fee lands within the reservation to the exclusion of state regulations where there was nothing to show that the non-Indian hunting and fishing activity threatened the tribe's political or economic security or that the tribe's subsistence or welfare was otherwise threatened. *United States v. Montana, supra,* 450 US at 566.

In the present situation we have noted that the closely interspersed Indian and non-Indian ownerships within the diminished reservation would make it difficult for two distinct systems of land use regulation to coexist effectively and harmoniously. Moreover, unlike the *Montana* case, there is a recent history of the application of Indian land use regulations to non-Indian fee lands within the diminished reservation.

Accordingly it is our opinion that within the diminished reservation, the Confederated Tribes can make a strong argument that they have the *exclusive* right to promulgate and apply a zoning ordinance to all lands, Indian and non-Indian alike in order to protect the tribes' health or welfare and, perhaps, even their political integrity and economic security, as well. In the context of the *Montana* case and the recent decisions in *Cardin, Knight,* and *Namen,* all *supra,* it is our opinion that such a claim would probably be upheld.

As to non-Indian fee lands outside the diminished reservation but within the original treaty boundaries, it appears to us that the question of the Confederated Tribes' authority to regulate such lands will depend upon how persuasive (FN6) a case the Tribes can muster factually to support their sovereign interest in regulating isolated non-Indian parcels outside the diminished reservation. (FN7)

SECOND QUESTION PRESENTED

Having determined that the Indians in all probability have the exclusive right to regulate non-Indian lands within the limits of the diminished reservation and may have authority to regulate other non-Indian fee lands within the remainder of the original reservation, (FN8) we reach the second question, which is whether the constitutional rights of non-Indians residing on the reservation would be violated because they are not given voting representation on the land use committee.

The answer is no. The Bill of Rights cannot be invoked against tribal action unless Congress has explicitly so provided. *Santa Clara Pueblo v. Martinez,* 436 US

49, 56-57 (1978); *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Namen, supra,* 665 F2d 951 at 964 (n 31). Congress has so provided in 25 USC secs 1301-1303. (FN9) *Santa Clara Pueblo v. Martinez, supra,* 436 US at 57. However, as long as the land use code bears a rational relationship to a stated objective, and as long as the code is reasonable and not arbitrary, the court will uphold the code against a charge that it violates the equal protection of the laws. *Village of Belle Terre v. Boraas,* 416 US 1, 7-8 (1974). *See also Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation, Wyoming, supra,* 670 F2d at 903-904; *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Namen, supra,* 665 F2d at 964; *City of Highland Park v. Train,* 519 F2d 681 (7th Cir. 1975); *Confederacion de la Raza Unida v. City of Morgan Hill,* 324 F Supp 895 (ND Ca 1971).

In *United States v. Mazurie,* 419 US 544 (1975), the defendants who had been denied a tribal liquor license by the Wind River Tribes were convicted of introducing spirituous beverages into Indian country in violation of 18 USC sec 1154. The Court commented on the fact the defendants as non-Indians could not participate in tribal government saying:

> "The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion. This claim, that because respondents are non-Indians Congress could not subject them to the authority of the Tribal Council with respect to the sale of liquor, is answered by this Court's opinion in *Williams v. Lee,* 358 U.S. 217 (1959). In holding that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians, we stated:
>
> > " 'It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. *The cases in this Court have consistently guarded the authority of Indian governments over their reservations.* Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf v. Hitchcock,* 187 U.S. 553, 564-566.' *Id.,* at 223 (citations omitted)." 419 US at 557-558. (Footnote reference omitted.)

In this instance the non-Indian fee owners are on the reservation presumably with the consent of Congress under the original Allotment Act of 1887, 24 Stat 388. In that status, they are subject to the laws of the Confederated Tribes governing the reservation because that is what Congress has provided or permitted. *See Williams v. Lee,* 358 US 217, 223 (1959). Accordingly, so long as the application of the proposed land use code to the non-Indian fee owners would not be arbitrary or discriminatory or otherwise constitutionally defective under 25 USC sec 1302, such owners could not validly complain. *United States v. Mazurie, supra,* 419 US 544 at 557-558 and n 12 at p 558; *Knight, supra,* 670 F2d at 903; *Namen, supra,* 665 F2d at 964 (n 31).

/s/ Dave Frohnmayer
Dave Frohnmayer
Attorney General

1. Approximately 65 percent of the reservation population is non-Indian.

2. We have been unable to verify whether or not the zoning ordinance was also intended to apply to lands outside the diminished reservation but within the original treaty boundaries.

3. The original 1855 treaty boundaries include about one-fourth of the City of Pendleton. The diminished reservation does not include any portion of the City of Pendleton. We are informed by counsel for the Confederated Tribes that there is no present indication that the Confederated Tribes intend to apply their land use code to the City of Pendleton. Accordingly, the analysis and conclusions of this opinion are predicated on the assumption that the Tribes' land use code will not apply to the City of Pendleton. Whether the Tribes could validly apply their land use code to the portion of the City of Pendleton which lies within the original treaty boundaries is a question which we do not address in this opinion.

4. 28 USC sec 1360(a) provides:

> "Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
>
> " . . . .
>
> "Oregon . . . . . All Indian country within the State, except the Warm Springs Reservation."

5. Nevertheless, under Public Law 280 the states retain the regulatory jurisdiction over the on-reservation activities of non-Indians that they enjoyed before that law. *White Mountain Apache Tribe v. State of Arizona,* 649 F.2d 1274, 1279 (9th Cir. 1981).

6. The result also may depend on whether as a legal matter the Tribes' reservation still encompasses the land outside the diminished reservation but still within the original treaty boundaries. We do not address this issue in this opinion.

7. There is of course a potential impact of tribal land use regulations on nearby territory and even on the state as a whole. However, major development within the reservation boundaries with significant effects beyond reservation boundaries would almost certainly require transportation and other off-reservation facilities. This suggests the necessity of cooperative land use decisions and agreements between the Confederated Tribes and the county and the state.

8. *See* footnote 3.

9. 25 U.S.C. sec. 1302 provides:

> "No Indian tribe in exercising powers of self-government shall—
>
> ". . . .
>
> "(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . ."

THE STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

[SEAL]

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Bronson C. La Follette
Attorney General
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Deputy Attorney General

October 19, 1982

Mr. James B. Mohr
Dstrict Attorney
Vilas County Courthouse
Eagle River, Wisconsin 54521

OAG 61-82

Dear Mr. Mohr:

You ask whether the Lac du Flambeau Band of Lake Superior Chippewa Indians has exclusive jurisdiction to regulate land use within the outer boundary of the Lac du Flambeau Reservation. You also ask whether the Band has authority to impose a moratorium on land division within the outer boundary of its reservation. It is my understanding that the Band recently rescinded its ordinance imposing such a moratorium and has no plan to reenact the ordinance within the foreseeable future. Consequently, this opinion will not address your second inquiry.

In this opinion, land tenure within the outer boundary of the Lac du Flambeau Reservation will be referred to either as "Indian land" or "fee land." Indian land includes land held in trust by the federal government, either for the Band or for individual Band members, together with land owned in fee by the Band and by Band members. Fee land refers to all land other than Indian land.

In my opinion, the Band has exclusive jurisdiction to zone all Indian land, and has jurisdiction concurrent with Vilas and Iron Counties to zone fee land located in each county unless it is established that county zoning would infringe on tribal self-government. If the exercise of county zoning jurisdiction infringes on tribal self-government, the Band would have exclusive zoning jurisdiction within the reservation.

The United States Supreme Court has repeatedly stated that Indian tribes retain attributes of sovereignty over both their members *and their territory. See Merrion v. Jicarilla Apache Tribe,* 102 S. Ct. 894 (1982); *Montana v. United States,* 450 U.S. 544, 563 (1981); *United States v. Mazurie,* 419 U.S. 544, 557 (1975). A tribe's territorial jurisdiction has been held to include in many cases all land within its reservation boundaries. *See, e.g., Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906) and *United States v. Wheeler,* 433 U.S. 313 (1978). A tribe's sovereign power is not derived from an Act of Congress, but is an inherent power which has never been extinguished. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). One aspect of a tribe's inherent sovereign power is the authority to zone all land within the reservation boundaries. *See, e.g., Knight v. Shoshone & Arapahoe Indian Tribes, etc.,* 670 F.2d 900 (10th Cir. 1982). *See also Confederated Salish & Kootenai Tribes, etc. v. Namen,* 665 F.2d 951, 962-64 (9th Cir. 1982), U.S. *appeal pending,* No. 82-22 (July 1, 1982).

An Indian tribe has the power to zone all land within its reservation unless divested of such power by federal law or necessary implication of its dependent status. *Cf.*

Merrion; Washington v. Confederated Tribes, 447 U.S. 134 (1980). Congress has not acted to deny Indian tribes the right to control through zoning the use of land located within their territorial jurisdiction. Nor, in my opinion, is such right denied by implicaton as a necessry result of an Indian tribe's dependent status.

In my opinion, the state has no power to zone Indian lands within the outer boundary of the Lac du Flambeau Reservation. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), *cert. denied,* 425 U.S. 1038 (1977). *See generally* 65 Op. Att'y Gen. 276 (1976). It follows that the Band's zoning authority over such land vis-a-vis the state is exclusive. The issue of whether the state has authority to zone fee land within the Lac du Flambeau Reservation is less clear.

The authority of local governments to regulate land use through zoning was recognized by the Supreme Court in *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365 (1926). Such zoning is considered an exercise of the sovereign police power to protect, among other things, the health, safety, morals or general welfare of the community. *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

The basic test for determining whether state or local governments have any regulatory authority within reservation boundaries was considered by the Supreme Court in *Williams v. Lee,* 358 U.S. 218 (1959). The Court held: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220.

Since a tribe has a significant governmental interest in controlling any conduct or activity within its territorial jurisdiction that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *Montana,* 450 U.S. at 566, it is likely that state regulation of the same subject matter would infringe on the tribe's powers of self-government. Concurrent state and tribal regulation of land use within a reservation, or the existence of a situation where the state and the tribe each zone different areas of a reservation in a checkerboard fashion, would be impractical. Unless both governmental authorities have similar long range planning goals, the two zoning plans may contradict and defeat each other. If such were the case, state zoning would probably infringe on tribal self-government and would be unenforceable. *Cf. Mescalero Apache Tribe v. State of N. M.,* 630 F.2d 724 (10th Cir. 1980), *vacated,* 450 U.S. 1036 (1981), *reinstated,* 677 F.2d 55 (10th Cir. 1982); *compare Washington.*

If both plans are substantially similar, then the need for dual regulation is minimized. Because state regulation cannot be applied to Indian lands, tribal zoning appears to be the only means to achieve comprehensive land use planning on reservations with mixed land ownership.

Two important related issues that arise in the context of tribal zoning of all reservation land which involve the rights of non-Indian land-owners merit comment. First, because non-Indians do not usually have the right to participate in tribal governments, there must be concern for the equal protection and property rights of non-Indians in the administration of the zoning plan. Second, non-

Indians must have a judicial forum within which to pursue those rights.

Under the Indian Civil Rights Act, 25 U.S.C. sec. 1302, no tribe shall: "(5) take any private property for a public use without just compensation; . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

These provisions, substantially similar to the relevant provisions of the United States Constitution, protect non-Indians as well as Indians in the enjoyment of their rights vis-a-vis tribal government. The rights of non-Indians are enforceable in the tribal courts. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Martinez,* 436 U.S. at 65.

While there may be some concern that non-Indians are not represented in tribal governments, the Supreme Court has held that fact to be immaterial. *Williams,* 358 U.S. at 223; *Mazurie,* 419 U.S. at 557-58. *Cf. Merrion,* 894 S. Ct. at 906-07.

In my opinion, the Lac du Flambeau Indian Band has exclusive authority to zone Indian land, and has concurrent jurisdiction with the state to zone fee land within the

tribe's reservation boundaries unless county zoning would infringe on tribal self-government.

Sincerely yours,

/s/ Bronson C. La Follette
Bronson C. La Follette
Attorney General

BCL:JDN:aag

CAPTION:

The Lac du Flambeau Indian Tribe has exclusive authority to zone Indian land, and has concurrent jurisdiction with the state to zone private property within the tribe's reservation boundaries unless county zoning would infringe on tribal self-government.

12/19/80

EPA POLICY FOR PROGRAM ADMINISTRATION ON AMERICAN INDIAN RESERVATIONS

The Reservation Environment

American Indian reservations represent a significant sector of our country and its environment. The home and remaining land base for over 200 Indian tribes, reservation lands cover an area larger than the six states of New England and in addition, the states of New Jersey, Delaware and Maryland.

These lands and their environmental problems are marked by contrast. Generally, they are characterized by vast distances, sparse populations and largely pristine environments. The environmental problems of the reservations are usually those common to rural America: safe drinking water and adequate sewer and waste disposal facilities. On the other hand, some reservations are located in urban areas, virtually surrounded by cities such as Phoenix and San Diego. And some reservations face the prospect of large-scale energy development, either on-reservation or nearby, with potentially massive environmental consequences for reservation lands.

There are over 250 Federally-recognized tribal governments with authority over reservation affairs. Commonly, tribal governments have tripartite functions, with executive, legislative and judicial responsibilities. Their court systems have the underlying civil jurisdiction to regulate on-reservation activities of non-Indians as well as tribal members.

In recent years, the reservations have witnessed a resurgence in Indian cultural interests and governmental

self-confidence. This has produced a growing tribal pressure to overcome their long-standing, historical exclusion from Federal decisionmaking (which in the past has largely been the province of non-Indians) that critically affects the future of reservation life.

A keynote of the growing tribal strength is a call for tribal "self-determination," the concept that Indian tribes can and should have the power to make, and carry responsibility for decisions affecting the future of reservation life. Self-determination has been recognized as a fundamental principle of Federal Indian Policy by recent Republican and Democratic administrations, and by Congress in the Indain Self-Determination Act of 1975 (P.L. 93-638).

Although all tribes are not alike, and although every tribe is subject to the human pressures that beset any government, tribal governments have generally shown a notable concern for decisionmaking which is protective of the future of Indian cultures, lands, and environment, as well as economic welfare. The conditions under which tribal authorities govern are not easy, but tribes have established impressive credentials for refusing to accept easy solutions. Despite most tribes' severe economic need, there are persistent examples of tribal decisions to avoid uncontrolled financial solutions where the long-range social and environmental effects were unacceptable.

Unique Problems Affecting Federal Regulatory Approaches to American Indian Reservations

Indian tribes and reservations, due to historical facts including treaties and the evolution of Federal law from the drafting of the Constitution to today, occupy a dis-

tinct place in our Federal system, somewhat different from that of the fifty states.

Although tribes are fully subject to Federal law and no longer interact with the Federal government through treaty-making, they retain the essential attributes of their original sovereignty. In addition, they retain certain rights established by earlier treaties and enjoy certain other rights assured by the Federal government and acknowledged at the time of the cessation of treaty-making. These latter rights are generally discussed in terms of the Federal Government's "trust responsibility" towards Indian tribes and lands.

In its broadest sense, the trust responsibility conveys a special Federal responsibility to foster and generally protect tribal interests and welfare. More often, the trust responsibility is discussed in connection with a specific Federal responsibility with regard to Indian land, to protect its value and, inherently, its environmental quality.

Another consequence of this special legal status of Indian tribes in our Federal system is that the states generally have only limited authority to regulate activities conducted on Indian reservations. This fact is particularly important to EPA because most of our statutes include a regulatory design utilizing state governments as entities for implementing, at the local level, coordinated Federal-state programs for the attainment of nationally-set goals and standards.

As state governments usually lack, on Indian reservations, the kind of power and regulatory authority they enjoy off-reservation, they cannot, in these cases, fulfill

on Indian lands the full regulatory role originally designed by Congress for the local implementing government. Nor does Congress generally provide for state assumption of such regulatory power over reservation affairs. Where allowed, any such assumption is strictly and carefully controlled.

Furthermore, the responsibilities and activities of the Bureau of Indian Affairs and the Indian Health Service are concerned primarily with the delivery of services on Indian lands and are not essentially regulatory in nature. As a consequence, these agencies cannot be expected to fulfill a direct regulatory role for reservation lands under the EPA statutes.

In recent legislation, particularly the Surface Mining Control and Reclamation Act of 1978, Congress confronted the problem of the legal limits on the ability of state governments to implement national regulatory programs on Indian reservations. In keeping with the general concept of tribal self-determination, Congress asked the Office of Surface Mining (OSM, at DOI) to recommend appropriate legislative language to allow tribal governments to fill the regulatory gap left by the states' jurisdictional shortfall.

Hence, without some modification, our programs, as designed, often fail to function adequately on Indian lands. This raises the serious possibility that, in the absence of some special alternative response by EPA, the environment of Indian reservations will be less effectively protected than the environment elsewhere. Such a result is unacceptable. "The spirit of our Federal trust responsibility and the clear intent of Congress demand full and equal

protection of the environment of the entire nation without exceptions or gaps under the programs for which EPA is responsible."

Finally, EPA must administer its programs in the context of public and community realities and of Federal policy towards program administration on Indian lands. In both respects, there is an unmistakable affirmation that Indian people, acting through their elected tribal governments, should have a primary role in the implementing decisions of Federal programs which affect the future of reservation life. This momentum results from the growth in strength and sophistication of tribal governments and a corresponding shift in Federal responses from an earlier, somewhat paternalistic attitude, towards one favoring self-determination. These factors—the Federal and tribal affirmations of the principle of tribal self-determination, the unique legal status of reservation lands and corresponding jurisdictional limits of state governments, and the special trust responsibility to safeguard reservation lands which the Supreme Court has placed upon the Federal establishment—all affect our Federal regulatory and programmatic responsibilities on Indian reservations in a manner that is unique.

These distinguishing factors affecting Federal program administration on Indian reservations become doubly important when we remember that they affect EPA's responsibilities over a land mass larger in area than the total of the New England states, New Jersey, Delaware and Maryland.

Why an Indian Policy

We are establishing a policy for implementing EPA programs on Indian reservations because:

* The unique legal status of reservation lands and the corresponding short-fall in state authorities there combine to require EPA to take a special approach to ensure that Indian lands receive the degree of protection which our Congressional mandate requires for the entire nation.

* Indian governments have the fundamental legal jurisdiction, generally lacked by state governments, to regulate both Indian and non-Indian pollution sources on the reservations. As tribal governments are increasingly showing an interest in (and the capability of undertaking) environmental regulatory programs, we want to support and encourage these environmental and regulatory predilections. The tribal interest and potential capability in the environmental arena constitute a national resource with environmental benefits extending beyond the reservation boundaries. As a Federal regulatory agency, we have an opportunity to foster and support the environmental interests of the natural allies we have in our sister governments.

* The environment is generally best protected by those who have the concern and the ability to protect it. Indian people show an acute sensitivity to their loss of great tracts of this country. Ever since the establishment of the original reservations by treaty, the Indian land base has shrunk to a minor fraction of the original reservations. This historical fact, combined with a long-standing cultural respect for the earth and its environment, is

reflected in tribal expressions of concern for the land, its irreplaceability, and the importance of its environmental quality.

Certainly, if the principle favoring local stewardship of the environment has meaning anywhere, it is on the Indian reservation. This argument has been asserted many times by tribal leaders seeking an increased involvement and participation in carrying out EPA programs on reservation lands. We want to support this principle for Indian lands, i.e. that the Indian people themselves are in the best position to protect the quality of the environment on the reservations where they live.

• Confused and often contradictory decisions regarding programs on Indian reservations have in the past frustrated efforts to address specific environmental problems by various EPA regional and program offices and by tribes, states and local governments. A clear and coherent policy is necessary to provide basic guidance and to form the basis for consistent decisionmaking.

• In addition, individual programs and regions have exercised initiatives in dealing with the particular problems of program implementation on Indian lands while others have made little or no progress. We need to build on the experience of the leaders within the Agency and, by carrying out a consistent Agency-wide policy, bring all parts of the Agency to a level of activity and progress consistent with that achieved by the Agency leaders.

Policy Statement and Principles

It is EPA policy to promote comprehensive environmental management by both states and tribes consistent

with the overall aims and objectives of Federal environmental statutes. The Agency will also follow the general Federal policy in support of tribal self-determination; that is, that Indian people should have a central role in decisions affecting the future of reservation life.

It is EPA policy to:

• Adapt and manage our national programs in response to the particular legal and political circumstances of Indian reservations so as to assure that these programs protect health and the environment on Indian reservations at least as effectively as elsewhere; and

• Promote an enhanced role for tribal government in relevant decisionmaking and implementation of Federal environmental programs on Indian reservations.

In support of these goals, EPA program managers will carry out their duties in a manner consistent with the following policy principles:

• EPA supports the principle of Indian self-determination and intends to follow this principle to enhance environmental protection on American Indian reservations. EPA will promote opportunities for tribal governments to assume a central role in implementing EPA's delegable Federal environmental programs and activities.

• Where tribes assume responsibilities for implementing Federal pollution programs, they will be expected to meet stringent standards, similar to those imposed on states, in order to assume programs. The Agency will work with tribes assuming such responsibilities to encourage the participation of affected parties in decisionmaking concerning the reservation area. A high priority

will be placed on working with tribes to enable them to meet and maintain these standards.

We recognize that, while tribes have the underlying civil jurisdiction to regulate reservation pollution sources, not all tribes have the present interest or administrative capability to carry out EPA programs in the manner that states do for non-Indian lands. Therefore, it must be clearly understood that EPA intends to provide tribes, where feasible, with the *option* to participate. EPA cannot and does not want to force or pressure individual tribes into assuming an unwanted role.

* Where tribes do not administer Federal pollution control programs on Indian lands, those activities and aspects of regulato y programs which states do not or cannot carry out on reservation lands will be administered by EPA. EPA is committed to assuring that the administration of Agency programs is as comprehensive and effective on Indian reservations as elsewhere.

* Where tribes do not assume responsibility for Federal program implementation, EPA will work with the tribes upon request to define other, more appropriate roles which they might take.

* Cooperation between tribal and state governments may be able to serve the mutual interests of both governments. Where such cooperation is working effectively or

where such cooperation is agreeable to all concerned parties, it should be recognized and encouraged. Effective pollution control often requires inter-governmental cooperation, and this should be fostered where appropriate.

Implementation

A statement of policy goals and principles is in itself not enough to effect changes or improvements in our program administration on Indian lands. They must be reflected in actions taken with responsiveness, intelligence and initiative at all levels of the Agency. Thus, I am taking several steps to help ensure that this policy is fully and effectively implemented.

* First, I am directing program managers to begin immediately to respond as fully as possible to tribal requests and problems so as to allow tribal governments to play a larger and more significant role in environmental programs on Indian reservations.

* Second, I am directing program managers to begin immediately to seek input from tribal governments when making EPA program decisions affecting reservation lands. Where EPA carries responsibility for implementing programs on Indian lands, a special effort must be made to assure that affected tribal governments have a meaningful voice in our implementation of those programs.

* Third, I am directing the Director, Office of Environmental Review, to coordinate, in conjunction with the Indian Work Group (IWG), program managers and Office Directors, a review of EPA's existing legal charter (both statutes and regulations) and to identify and pursue modi-

fications necessary to (a) resolve the regulatory problems currently arising from limitations to state jurisdiction on Indian reservations, and (b) allow tribal governments the option to play a central and significant role in implementing our programs on Indian reservations.

* Fourth, I am directing the Director, Office of Environmental Review, to develop, in coordination with the Indian Work Group and key program managers and Office Directors, an Agency Implementation Plan, to carry the forces of Agency policy, listing specific Agency activities which, in addition to those listed above, will lead to the orderly and effective realization of this policy. EPA has already identified numerous issues which must be considered in developing detailed policy implementation proposals. Such issues, for instance, pertain to resource requirements, tribal/state relations and cooperative efforts with other Federal agencies. In this regard, individual program and regional offices have already set a precedent demonstrating the Agency's ability to deal with these issues in carrying out the basic objectives of this policy.

* Fifth, I am directing the Director, Office of Environmental Review, in conjunction with the Indian Work Group and key program managers and Office Directors, to undertake periodic review of Agency program implementation acivities affecting Indian lands, and to develop such other principles of policy and guidance on specific issues to be included as amendments to this policy as necessary to carry out the overall objectives of this policy in an orderly and rational manner.

Finally, a key to the successful implementation of this policy is the coordination of EPA and tribal efforts, along

with the related efforts of IHS, BIA and other Federal agencies and state and local governments, to protect and enhance the environment of reservation lands. To help accomplish this important aim, EPA officials must remain constantly exposed to a range of reservation experiences and information, and must maintain contact with those people who represent tribal viewpoints and are working to meet reservation concerns. The emphasis on ongoing, institutionalized follow-up and non-Federal involvement is intended to provide a climate conducive to the development and execution of policies, programs, and initiatives which are sensitive to reservation needs and circumstances.

/s/ Barbara Blum
Barbara Blum
Deputy Administrator

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protective Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory acivities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance enviromental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protective Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (*i.e.* responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the dis-

tinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABLITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed

to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

/s/ William D. Ruckelshaus
William D. Ruckleshaus

Nos. 87-1622, 87-1697, and 87-1711

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
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v.
CONFEDERATED TRIBES AND BANDS OF
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On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF THE COLORADO RIVER INDIAN TRIBES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae	1
Summary of Argument	3
Argument	4
I	
In determining which entity has land use regulatory authority over fee lands on reservations, the Court looks at the scope of inherent tribal sovereign powers, at relevant treaties, and at all relevant subsequent laws which may either preempt or confer state or tribal authority	4
II	
At the time the Yakima Reservation was created, the tribe possessed civil regulatory power throughout its reservation over both Indians and non-Indians	9
III	
Federal actions since the creation of the Yakima Reservation confirm tribal authority to zone fee lands on the reservation and preempt any county authority to zone such lands	10
A. The General Allotment Act of 1887	10
B. The Indian Reorganization Act	14
C. The 1948 Enactment of a New Statutory Definition of "Indian Country," 18 U.S.C. Section 1151	15
D. Post-1948 Enactments and Policy Statements	17
IV	
Tribal authority to zone and regulate land use on fee lands within the reservation is essential to the political integrity, economic security, health and welfare of the tribe	19
A. Importance of Tribal Zoning	19
B. County Zoning of Fee Land Undermines and Is Inconsistent With Tribal Zoning Authority	21
C. The Zoning Scheme Urged By Petitioners Would Engender Other Unfair and Illogical Results	25

TABLE OF CONTENTS

Page

V

If remedies for alleged violations of civil rights of non-Indians on fee lands in Indian reservations are inadequate, the proper solution is congressional action, not judicial revamping of the fundamental precepts of Indian law ... 26

Conclusion 30

TABLE OF AUTHORITIES CITED

Cases

Page

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Page

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.....10, 11, 12, 22
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Table of Authorities Cited

Statutes

Page

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30 Stat. 1058, 1063..... 2
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Page

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On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF THE COLORADO RIVER INDIAN TRIBES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Colorado River Indian Tribes ("CRIT") is an Indian tribe organized in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. section 476 ("IRA"). The Colorado River Indian Reservation comprises approximately 275,000 acres of land in both California and Arizona spanning the Colorado River north of Blythe, California. The Reservation was established by Congress on March 3, 1865 (13 Stat. 559). The boundaries of the Reservation were expanded and further delineated by Executive Orders of November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915. The Reservation was established to provide a permanent homeland for the Indian tribes of the Colorado River, and it encompasses a portion of the traditional homeland of the Mohave tribe.

The townsite of Parker lies on the Arizona side of the Colorado River within the exterior boundaries of the Reservation. Whether Parker is part of the Reservation, as CRIT and the United States contend, or is instead an island of non-reservation land surrounded by the Reservation, as Parker claims, is disputed in litigation currently pending in United States District Court for the District of Arizona. *Colorado River Indian Tribes v. Town of Parker*, No. CIV 83-2359-PHX-RGS.[1]

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[1] The Town of Parker has filed an amicus curiae brief in support of petitioners in this case. In its brief, Parker does not adhere to proper rules of practice by simply describing its interest in the case and then presenting legal argument relating to the case before the Court. Rather, Parker presents to this Court an extensive summary of the legal arguments it has presented to the United States District Court in *CRIT v. Parker*, terming these arguments a "summary of facts." Parker then proceeds to argue to this Court that fee lands within Parker should not be subject to tribal authority.

Parker's argument is improper on several counts. First, the issues addressed by Parker are pending before the United States District Court in Phoenix, not before this Court. Second, the arguments labeled "facts" by Parker are not undisputed facts supported by evidence. Rather, they are inaccurate representations of fact mixed in with legal argument. The evidence in the record before the District Court paints a factual picture far different from that presented by Parker in its amicus brief. This

Approximately two-thirds of the lots in Parker are fee patented lots owned by non-Indians and Indians. The remaining one-third of the lots were never patented and are either owned by the United States in trust for CRIT, as the United States and CRIT contend, or by the United States, as Parker contends. Elsewhere on the Reservation, the vast majority of land is owned by the United States in trust for CRIT. Less than 10,000 acres of the Reservation was allotted to individuals pursuant to the Allotment Acts of April 21, 1904 (33 Stat. 224), and March 3, 1911 (30 Stat. 1058, 1063).

According to the U.S. Census, as of 1980 there were 7,873 persons living on the Reservation, of whom 1,965 (25%) were American Indians. Within the town of Parker, in 1980 there were 2,542 persons, 282 of whom (11%) were American Indians. There are approximately 2980 enrolled members of CRIT.

CRIT has exercised land use regulatory authority throughout the Reservation, including in the town of Parker. CRIT has adopted a number of land use ordinances which regulate such matters as development permits, off-road vehicles and preservation of cultural resources. In September 1988, CRIT adopted a comprehensive general plan for a 20,000 acre portion of the Reservation known as "the Western Boundary," which comprises the majority of the California side of the Reservation. CRIT intends to adopt additional area plans for other portions of the Reservation as well. CRIT is also in the process of developing a Reservation-wide zoning code.

Within the town of Parker, both CRIT and Parker assert land use regulatory authority. The fact that Parker has required tribal compliance with its building and zoning laws on both fee lots and non-fee lots in Parker has underscored conflicts with CRIT

Court should not assume to be true any of the factual assertions made by Parker in section II of its brief.

Despite CRIT's intense desire to set the record straight before this Court, it will refrain from repeating the errors made by Parker and will not embark on any argument of the merits of *CRIT v. Parker*. The only facts from that case presented herein are those that are necessary for CRIT to describe its interest in the case before this Court.

regulations and has caused serious problems for CRIT and its members.

Insofar as the Court's decision in this case could affect which jurisdiction—CRIT, the town of Parker, or the counties of La Paz, Arizona or San Bernardino or Riverside, California—has land use regulatory authority over fee lands and trust lands within the Colorado River Indian Reservation, CRIT has a very strong interest in the outcome of this case.

SUMMARY OF ARGUMENT

This brief presents two parallel, complementary arguments. One is largely legal; the other largely factual. CRIT's legal argument places the holding in *Montana v. United States*, 450 U.S. 544 (1981) and its language concerning tribal sovereign authority over non-Indians on fee lands into the context of over 150 years of treaties, statutes, and case law. CRIT shows that *Montana* cannot be construed to impose the narrow limits on tribal civil regulatory authority urged by petitioners. If so construed, *Montana* conflicts in fundamental ways with prior law. Instead, *Montana* must be understood as an affirmation of inherent tribal authority "necessary to protect tribal self-government [and] to control internal relations." 450 U.S. at 564.

To give that affirmation full force, and to avoid an abrupt departure from prior case law, the Court must endow the *Montana* language regarding tribal authority over non-Indians on fee lands with vigor and meaning. The inevitable conclusion is that in this case, as will be true in most cases, the tribe will be found to have retained the exclusive power to zone fee lands within the reservation.

The factual argument presented in this case demonstrates that allowing counties and cities to zone fee lands within Indian reservations (and concomitantly stripping tribal governments of that authority) prevents tribal governments from regulating conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. This argument is rooted in the fact that the power to zone within "Indian country" is an essential aspect

of the right of tribal self-government. It is undisputed that Indian tribes have the power to zone trust lands. That power cannot possibly be effective if the tribe cannot also regulate adjacent or interspersed fee lands within the reservation. Thus, in virtually all instances, eliminating tribal zoning authority over such lands would effectively deprive the tribe of the ability to protect the health, safety, and welfare of its members and of all those people residing on the reservation.

ARGUMENT

I

IN DETERMINING WHICH ENTITY HAS LAND USE REGULATORY AUTHORITY OVER FEE LANDS ON RESERVATIONS, THE COURT LOOKS AT THE SCOPE OF INHERENT TRIBAL SOVEREIGN POWERS, AT RELEVANT TREATIES, AND AT ALL RELEVANT SUBSEQUENT LAWS WHICH MAY EITHER PREEMPT OR CONFER STATE OR TRIBAL AUTHORITY

Most of the briefs in support of petitioners focus exclusively on the narrow issue whether, under *Montana v. United States*, 450 U.S. 544 (1981), the Yakima Nation has the authority to zone fee lands within the reservation. While this issue is indeed presented to the Court in this case, it is only part of the larger question before this Court. That central question is which entity has zoning and land use regulatory authority over fee lands within an Indian reservation—the tribe or the city or county within which the fee lands lie? In reviewing this case, the Court must therefore look not only at the case law defining the extent to which an Indian tribe may regulate non-Indians and fee land on the reservation; it must also carefully consider the authorities describing the permissible reach of state regulatory jurisdiction on Indian reservations.[2]

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[2] As CRIT's own experience confirms, concurrent zoning or other land use regulatory authority over fee lands is infeasible. To the extent that the regulations imposed by the County and the tribe conflict, a logjam would be created, and neither entity could effectively regulate land use. *See* Section IV below. *See* also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983) (concurrent state and tribal jurisdiction "would effectively nullify the Tribe's authority to control hunting and fishing on the reservation" and "could severely hinder the ability of the Tribe to conduct a sound management program"); *Segundo v. City Rancho Mirage*, 518 F.2d 1387, 1393 (9th Cir. 1987).

The scope of tribal authority over fee lands within Indian reservations is defined by two parameters: inherent tribal sovereign powers and powers conferred or withdrawn by treaties and other federal laws. Summarizing the nature of tribal sovereign powers in *United States v. Wheeler*, 435 U.S. 313, 323 (1978), this Court stated:

> Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Tribal sovereign powers are also commonly referred to as "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 151 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-173 (1973).

The Court has emphasized that there is a "significant geographical component to tribal sovereignty . . . 'The cases in this Court have consistently guarded the authority of Indian governments over their reservations.' " *White Mountain Apache*, 448 U.S. at 151 (quoting *Williams v. Lee*, 358 U.S. at 223). Recently, in *Iowa Mutual Ins. Co. v. LaPlante*, 107 S.Ct. 971 (1987), the Court took pains to point out that the attributes of sovereignty retained by tribes extend throughout their territory to non-Indians as well as Indians on the reservation. The Court stated, "Indian tribes retain 'attributes of sovereignty over both their members and their territory.' " 107 S.Ct. at 975, quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975). In other words,

> Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149, n.14 (1982) (upholding tribe's authority to impose a severance tax on oil and gas production by non-Indians on reservation land).

The Court also discussed the nature of tribal sovereign powers in *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the Court reaffirmed that the inherent sovereign powers retained by Indian tribes are those "necessary to protect tribal self-government [and] to control internal relations." 450 U.S. at 564. In the context of regulation of non-Indians on fee lands in the reservation, tribal sovereign powers include the power to regulate non-Indian conduct "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," or where a non-Indian has entered a consensual relationship with the tribe or its members. 450 U.S. at 566.

To determine whether tribal powers have been conferred or withdrawn by treaties or other federal laws, courts must scrutinize the applicable treaties and laws in each case. Ambiguities in those laws are to be resolved in favor of Indians "in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 144. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 174-75. As stated in *Felix S. Cohen's Handbook of Federal Indian Law* (1982) (hereinafter "*Federal Indian Law*"), at 221, 224-25:

> Since congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent and have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians.
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> * * *
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> [The canons] provide for a broad [statutory] construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited.

The scope of state or local civil regulatory jurisdiction on an Indian reservation is also determined by reference to inherent tribal sovereign powers and federal law. There are two independent but related barriers to assertion of state regulatory authority over Indian country and tribal members. First, such exercise of authority may be preempted by federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). As the Court has repeatedly emphasized, the preemption analysis used in determining jurisdiction over Indian reservations is strikingly different from that used in other areas of the law:

> Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.

White Mountain Apache, 448 U.S. at 143 (citing *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475 (1976)).

The Court has found that the federal purposes of Indian treaties and statutes are broadly preemptive of state law, and in many circumstances has found state laws preempted based not on specific preemptive language but rather on implications from general purposes of federal treaties and statutes. *See, e.g., Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. at 838; *Fisher v. District Court*, 424 U.S. 382 (1976).

As a general matter, state laws may be enforced against non-Indians in Indian country only "up to the point where tribal self-government would be affected." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 179. The Court has held state authority over non-Indians acting on reservations to be preempted in a number of cases even though Congress had made no express statement on the subject. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Kennerly v.*

District Court of Montana, 400 U.S. 423 (1971); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959).

Second, exercise of state authority within Indian country may be an unlawful infringement on tribal sovereign authority. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142, 151; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 168-173; *Williams v. Lee*, 358 U.S. at 220. In general, the Court has emphasized that within the boundaries of "Indian country," as the term is defined in 18 U.S.C. section 1151, states have strictly limited civil regulatory authority. As the Court stated in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973), quoting from *United States v. Kagama*, 118 U.S. 375, 381-82 (1886), Indian tribes have retained

> "a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

In sum, whether the Court focuses on the permissible extent of state authority on the reservation or the scope of tribal authority over fee lands, and whether the Court couches its analysis under the rubric of "preemption" or that of "inherent tribal sovereign powers," the factors to be analyzed remain the same. The Court must determine whether the Yakima Nation, by virtue of treaty or inherent powers, originally had the power to zone all lands in the reservation, including the lands in question in this case. Then the Court must review pertinent subsequent Congressional actions to determine the extent to which state authority is preempted, or conversely, tribal authority has been diminished.

II

AT THE TIME THE YAKIMA RESERVATION WAS CREATED, THE TRIBE POSSESSED CIVIL REGULATORY POWER THROUGHOUT ITS RESERVATION OVER BOTH INDIANS AND NON-INDIANS

In the treaty between the tribes of the Yakima Indian Nation and the United States which was signed in 1855 and ratified in 1869, 12 Stat. 951, the tribes ceded vast areas of land, at the same time reserving an area for their "exclusive use and benefit." The treaty provided that no white man could reside on the reservation without permission of the tribe. *Id.* Petitioners do not dispute that this treaty conferred upon the Yakima tribe full authority to govern use of the lands in the reservation and to control use of those lands by both tribal members and non-Indians. Rather, petitioners and their amici argue only that any authority which the tribe had over non-Indians was subsequently removed by acts of Congress and, most particularly, the Allotment Act of 1887.

That tribal sovereign power at the time the Yakima Reservation was created extended to the actions and use of land by non-Indians on the reservation is also clear. In the seminal case of *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515 (1832), holding that the State of Georgia could not exercise jurisdiction over a non-Indian on the Cherokee Reservation, Chief Justice Marshall noted that Indian tribes retained broad inherent powers over their territories:

> The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power.

As of the 1850's and 60's, tribal sovereign powers as described by Chief Justice Marshall remained intact, as neither congressional action nor judicial interpretation had placed any limits upon the holding in *Worcester v. Georgia*.

Thus, the Court must determine whether any subsequent action of Congress stripped the Yakima tribe of its authority to

zone some of its lands. At the same time, relevant subsequent congressional acts must be scrutinized to determine whether they preempt, either expressly or by implication, state authority over fee lands on the reservation.

III

FEDERAL ACTIONS SINCE THE CREATION OF THE YAKIMA RESERVATION CONFIRM TRIBAL AUTHORITY TO ZONE FEE LANDS ON THE RESERVATION AND PREEMPT ANY COUNTY AUTHORITY TO ZONE SUCH LANDS

A. The General Allotment Act of 1887

Petitioners' arguments in support of County zoning authority over fee lands on the reservation rest largely on the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. section 331 et seq. Indeed, petitioner Wilkinson acknowledges that in the absence of this Act, "that former treaty right [to exclude non-members from their reservation] might now serve as authority for Tribal regulation of non-members' use of fee land." Wilkinson Brief at 33. When Congress authorized the allotment of plots of reservation land to individual Indians and the disposal of "surplus" lands to non-Indians, petitioners argue, Congress specifically intended that those non-Indian purchasers and their fee lands should not be subject to tribal regulation. Since Congress contemplated ultimate dissolution of Indian tribes and assimilation of Indians into non-reservation life, they argue, Congress could not have simultaneously intended that non-Indian land purchasers remain subject to tribal regulatory authority.

Similar arguments have been rejected time and again in the context of disestablishment cases that have come before this Court. *See, e.g., Solem v. Bartlett.* 465 U.S. 463 (1984); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962). In each of those cases, it was argued that laws passed by Congress pursuant to its Allotment Act policy of allotting lands to individual Indians and selling surplus lands to non-Indians were intended to and did terminate the reservation status of the lands covered by the laws. The Court, however, has

been unwilling to assume from the overall understanding of that time that reservations would be terminated a specific desire of Congress to terminate reservation (or "Indian country") status of lands whenever they were opened up for sale to non-Indians. *Solem v. Bartlett*, 465 U.S. at 468-472.

With respect to the General Allotment Act, this Court has stated:

> The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour v. Superintendent, 368 U.S. at 356. *See Mattz v. Arnett*, 412 U.S. at 496-7. The Court has emphasized that when Congress truly intended an act not only to make Indian lands available for sale to non-Indians but also to remove those Indian lands from the reservation (and from tribal jurisdiction), it used language that clearly and specifically indicated such an intent. *Mattz v. Arnett*, 412 U.S. at 504.

The Court's decision in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) is most instructive on this point. There the state argued that it had taxing jurisdiction over Indians on fee lands within the reservation because that was the intent of the General Allotment Act. The Court rejected this argument, noting that the disestablishment cases had effectively disposed of the issue. 425 U.S. at 478. The Court stated:

> If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size. A similar claim was made by the State in *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), to which we responded:
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> > "[The] argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal juris-

> diction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government." *Id.*, at 358, 82 S.Ct., at 428, 7 L.Ed.2d, at 351.
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> * * *
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> Congress by its more modern legislation has evinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.

425 U.S. at 478-79. The holding in *Moe* is on point. Congress did not intend by the General Allotment Act to remove fee lands from tribal jurisdiction, whether the fee lands were ultimately held by Indians or non-Indians.

Petitioners propose to make the disestablishment issue a nullity by establishing a new rule whereby fee lands on Indian reservations are not subject to tribal regulatory authority. Presumably this is because under the congressional intent standard carefully enunciated by this Court, the fee lands at issue clearly have not been disestablished from the reservation. Thus, having lost the disestablishment battle, petitioners propose a new standard under which lands not disestablished from a reservation may be treated as if disestablished. Amicus CRIT contends to the contrary: the jurisdictional question surrounding fee lands created pursuant to allotment and surplus land acts is primarily a disestablishment question which revolves around whether Congress intended to remove those fee lands from the reservation.[3] The Court should not at this late stage create a brand new status for fee lands within Indian country which status entirely deprives Indian tribes of their regulatory authority over such lands.

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[3] Adhering to the Court's traditional view that the principal jurisdictional issue regarding fee lands is whether or not Congress intended that they be disestablished from the reservation would have the additional beneficial effect of reducing uncertainty and thereby reducing the need for litigation to resolve jurisdictional questions.

Other authorities also contradict petitioners' argument concerning the General Allotment Act. The case most directly on point is the 1905 case, *Buster v. Wright*, 135 Fed. 947. In this case, the Eighth Circuit held that neither the establishment of town sites within the Creek Nation territory nor the sale of lots therein to non-Indians deprived the Creek Nation of jurisdiction over those townsites or lots. The Court stated:

> the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of its territorial jurisdiction by citizens or foreigners.

135 Fed. at 952.

This Court endorsed the same opinion in *Morris v. Hitchcock*, 194 U.S. 384, 392 (1904) (in upholding a tribal tax on livestock owned by non-Indians, Court approves concept of tribal taxation of hay grown on non-Indian fee lands in reservation). Two turn of the century Attorney General opinions follow the same reasoning. 23 Ops. Atty. Gen. 214 (1900); 23 Ops. Atty. Gen. 528 (1901). In considering the effect of an 1898 act providing for the organization of municipal corporations, the selection of town sites, and the appraisal and sale of town lots to non-Indians within the Creek Reservation, the Attorney General stated:

> if the Indian title to the particular lots sold had been extinguished, and conceding that the statute authorizes the purchase of such lots by any outsider, and recognizes his right to do so, the result is still the same, for the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation, nor does it authorize him to do any act in violation of the treaties with such nation.

23 Ops. Atty. Gen. at 217.

B. The Indian Reorganization Act

By the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), Congress repudiated the policy of allotment and sale of Indian lands. 25 U.S.C. sections 461-475. The IRA stopped further alienation of Indian lands, authorized the Secretary of Interior to restore any remaining unsold surplus lands to tribal ownership, and reconfirmed the continued existence of tribal sovereign powers. *Id.* In addition to listing a number of specific powers retained by Indian tribes, the Act affirmed that tribes have "all powers vested in any tribe or tribal council by existing law." 25 U.S.C. section 476.

Insofar as petitioners argue that Congress intended by the General Allotment Act to terminate Indian reservations and tribal jurisdiction, the IRA represents a total reversal of that policy. The IRA was the first modern federal action enunciating the now well-established policy favoring tribal self-determination. While the IRA does not explicitly address the issue of tribal authority over fee lands within a reservation, by reaffirming tribal powers in Indian country and by ending allotment and sale of Indian lands it strongly supports such authority.

That the "existing powers" referred to in the IRA include authority over non-Indians and fee lands is demonstrated by 1934 Department of Interior Solicitor opinion discussing the nature of such "existing powers." 55 I.D. 14 (1934).[4] The Solicitor's opinion finds that "existing powers" include the powers "to regulate the use and disposition of all property within the jurisdiction of the tribe," and "to levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the reservation." Opinions of the Solicitor, Department of the Interior, vol. 1 at 446.

Nothing in the Solicitor's Opinion indicates that tribal "existing powers" do not extend to fee lands within the reservation.

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[4] This opinion has been cited and relied upon by this Court. *See Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 153 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 174-85 (1982).

Nevertheless, as described in the following section, even if there was some confusion about tribal powers over fee lands as of 1934 because such lands were not considered "Indian country," in 1948 Congress eliminated this uncertainty and mandated tribal authority over such fee lands when it enacted a new definition of "Indian country."

C. The 1948 Enactment of a New Statutory Definition of "Indian Country," 18 U.S.C. Section 1151

A key statute that should guide the Court's review of this case is the federal definition of "Indian country," 18 U.S.C. section 1151, enacted in 1948. The term "Indian country" rather than "reservation" has historically been the determining term for jurisdictional purposes. *See Federal Indian Law* at 27-45. Prior to 1948, "Indian country" was not generally understood to include lands not owned by an Indian tribe. The first statutory definition of "Indian country," contained in the 1834 Indian Trade and Intercourse Act (4 Stat. 729) provided in pertinent part:

> [A]ll that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state [,] *to which the Indian title has not been extinguished*, for the purposes of this act, be taken and deemed to be the Indian country.

(Emphasis added.)

After this statute was omitted from the 1874 Revised Statutes (R.S. section 5596, effective June 22, 1874), the definition of "Indian country" was left to the courts. Decisions by this Court in following years held that "Indian country" included land "lawfully set apart as an Indian reservation," *Donnelly v. United States*, 228 U.S. 243 (1913), Pueblo Indian lands in New Mexico, *United States v. Sandoval*, 231 U.S. 28 (1913), and trust allotments, *United States v. Pelican*, 232 U.S. 442 (1914). The Court stated that the test was whether the land in question "had been validly set apart for the use of the Indians as such, under the superintendence of the Government." *United States v. Sandoval*,

231 U.S. at 449. *See also United States v. McGowan*, 302 U.S. 535 (1938).

Relying upon these decisions, in 1948 Congress codified the definition of "Indian country." *See* 18 U.S.C. section 1151 Historical and Revision Notes; *Federal Indian Law* at 34. Congress also provided that fee lands within Indian reservations were Indian country, thus changing the prior rule. Section 1151 provides in pertinent part:

> [T]he term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent*, ...

(Emphasis added.)

This Court has held that the term "Indian country" as defined in section 1151 does not apply just to the criminal code sections in that chapter, but "generally applies as well to questions of civil jurisdiction," *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975), and also to questions of tribal jurisdiction. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. at 477-79. *See Federal Indian Law* at 27 n.8, 28.

By defining "Indian country" to include fee lands within reservation boundaries, Congress enunciated its clear intention that fee lands and non-fee lands within the reservation be treated alike for jurisdictional purposes. Whereas prior to 1948 the status of fee lands within a reservation was in question, Congress in enacting section 1151 intended to put a definitive end to those questions by treating all land within the boundaries of an Indian reservation as "Indian country."[5]

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[5] In light of the widespread pre-1948 belief that fee lands could not be considered "Indian country," it is to be expected that pre-1948 statements on the issue might conclude that Indian tribes lacked jurisdiction over fee lands. What is surprising is the extent to which such actions and holdings reflect a persistent belief that Indian tribes *did* maintain jurisdiction over fee lands. *See, e.g., Morris v. Hitchcock*, 194 U.S. 382; *Buster v. Wright*, 135 Fed. 947; 55 I.D. 14; 23 Ops. Att'y Gen. 214; 23 Ops. Att'y Gen. 528.

Thus, even if tribal authority over fee lands on the reservation were not already clear from prior treaties and statutes as well as inherent tribal sovereign powers, it is certainly clear from the enactment of section 1151. That section evinces a congressional intent to preempt state authority over fee lands on reservations and to confirm tribal and federal authority over such lands.

D. Post-1948 Enactments and Policy Statements

Notwithstanding petitioner Brendale's arguments, this Court has repeatedly held that Pub. L. 280, 67 Stat. 588, as amended, 18 U.S.C. section 1162, 28 U.S.C. section 1360, did not confer upon states general civil regulatory jurisdiction over Indian reservations. *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083, 1087-88 (1987); *Bryan v. Itasca County*, 426 U.S. 373 (1976). Nor did Pub. L. 280 strip tribes of any of their jurisdiction over their reservations. Thus, Pub. L. 280 is not relevant to this case.

Other more recent federal enactments are relevant, however, in demonstrating a consistent and pervasive federal policy encouraging tribal self-government, self-determination and economic independence. For example, the Indian Financing Act of 1974, 25 U.S.C. section 1451 et seq., states:

> It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Section 1451. Similar policies underlie the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. section 450 et seq. The Indian Civil Rights Act of 1968, 25 U.S.C. section 1301, et seq. also reflects the Congressional intent "to promote the well-established federal 'policy of furthering Indian self-government.' " *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978), quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

In addition, both President Nixon and President Reagan issued policy statements strongly supporting Indian tribal self-government. 6 Weekly Comp of Pres. Doc. 894, 899-900 (1970) (Message of President Nixon); 19 Weekly Comp. Pres. Doc. (Jan. 24, 1983) (Message of President Reagan). Cf. Gross, Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Policy, 56 *Texas L. Rev.* 1195 (1978). Numerous decisions of this Court have emphasized the importance of this overriding federal policy of recent decades. *See e.g., National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. at 856; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 332; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 137, 138 n.5; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152; *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143-44 n.10.

These recent actions by both the legislative and the executive branches evince a clear federal goal not only of promoting tribal self-government and economic security, but also of fostering the mechanisms and tribal authority necessary to achieve these goals. The power to zone and to regulate land use within a political entity's jurisdiction is one of the most fundamental and essential attributes of self-government. *See* section IV below.

Denial of tribal zoning authority over fee lands on the reservation would run totally contrary to the clear federal policy of promoting tribal self-government. That federal policy, as set forth in numerous statutes, presidential statements, and the statements of this Court, requires a finding that state, county and city land use regulatory authority over fee lands in Indian reservations is preempted and tribal authority over such lands is exclusive.

IV

TRIBAL AUTHORITY TO ZONE AND REGULATE LAND USE ON FEE LANDS WITHIN THE RESERVATION IS ESSENTIAL TO THE POLITICAL INTEGRITY, ECONOMIC SECURITY, HEALTH AND WELFARE OF THE TRIBE

The parties agree that under the holding in *Montana v. United States*, tribal authority over non-Indian conduct on fee lands within the reservation is proper insofar as that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. Petitioners and their amici argue, however, that the Ninth Circuit gave too much sweep to that language by finding it a proper basis for Yakima tribal authority to zone fee lands within the reservation.[6] Petitioners apparently do not understand either the fundamental importance of the power to zone or the devastating impacts upon Indian tribes that would result from depriving the tribes of land use regulatory authority over fee lands sprinkled throughout their reservations.

A. Importance of Tribal Zoning

Zoning is an exercise of police power, the power of government to protect the public health, safety and welfare. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1927). The authority to plan and zone—whether exercised by a county, a municipality, or an

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[6] Petitioners argue that under *Montana*, Yakima County has authority to zone fee lands within the reservation, regardless of ownership of those lands. As respondent Yakima Nation points out, however, many of the fee lands within the reservation are owned by individual tribal members or by the tribe itself. The language in *Montana* relied upon by petitioners relates only to *non-Indian conduct* on fee lands and thus cannot provide any authority for County zoning of fee lands owned by the tribe or by tribal members. *Montana* would, at most, provide the county zoning authority over fee lands owned by non-Indians. Yet such a scheme would require that the authorities keep track of both the fee or non-fee status of parcels and the ownership of the fee parcels. As sales between Indians and non-Indians occur, parcels would oscillate from one zoning jurisdiction to another.

Indian tribe, is among the most important powers that a local governing body possesses. As Justice Marshall stated, zoning "may indeed be the most essential function performed by local governments, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1973) (Marshall, J., dissenting), quoted with approval in *Young v. American Mini Theaters*, 427 U.S. 50, 80 (1976) (Powell, J., concurring).

The power to zone is particularly important to Indian tribes because they possess unique historical, physical, and spiritual ties to their lands. *See* Comment, Jurisdiction to Zone Indian Reservations, 53 *Wash. L. Rev.* 677, 680 (1978). Justice Black discussed this historical connection in a case involving federal eminent domain over ancestral Indian land:

> It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children, and their forbears were born. They, too have their memories and their loves.

F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

Similarly, in the First Amendment context, Justice Brennan recently described the spiritual connection between Indians and the land:

> Native American faith is inextricably bound to the use of land. . . . The site specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S.Ct. 1319, 1331 (1988) (Brennan, J., dissenting). For Indians, "land is not fungible." 108 S.Ct. at 1331. Tribal governments use their zoning power to nurture and protect fundamental Indian beliefs

about the appropriate uses of land. *See* Comment, Jurisdiction to Zone Indian Reservations, 53 *Wash. L. Rev.* at 680; D. Suagee, American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers, 10 *American Indian Law Review* 1, 13 (1982).

The ability to regulate reservation lands is also essential to tribal programs that promote the economic development of tribal economy. As the Ninth Circuit stated in striking down a county's attempt to enforce its zoning and building code on tribal trust lands, "tribal use and development of tribal trust property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life." *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 664 (9th Cir. 1975).

B. County Zoning of Fee Land Undermines and Is Inconsistent With Tribal Zoning Authority

Effective planning and zoning require the "systematic and coordinated utilization of land" in a particular area. N. Williams, *American Land Planning Law*, section 1.06 (1974). The planned pattern "must be coherent and internally consistent; that is, the various component parts must fit with each other" or "the result will be a disorganized mess of patchy development." *Id.* at section 1.07.

Petitioners in this case do not challenge tribal zoning authority over trust lands. It is clear that tribal governments have full authority to regulate land use on trust lands. *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987); *Iowa Mutual Ins. Co. v. LaPlante*, 107 S.Ct. at 975. Petitioners propose a scheme whereby tribes have full regulatory authority over trust lands in reservations but the county has authority over the fee lands within the reservation. Such a regulatory scheme would create a "crazy quilt" of checkerboard zoning throughout the reservation, with the tribal zoning applying to one set of lands and county zoning applying to the other. The checkerboard pattern is apparent in the instant case: Whiteside's property is bounded by trust land to the north, and fee land to the south, east, and west. *Yakima Indian Nation v. Whiteside*, 617 F.Supp. 750, 754 (E.D.

Wash. 1985). Other fee lands are "scattered throughout the reservation in checkerboard fashion." *Tribes and Bands of Yakima Indian Nation v. Whiteside*, 826 F.2d 529, 531 (9th Cir. 1987).

This Court has repeatedly rejected similar proposed jurisdictional divisions. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. at 478 (rejecting scheme in which state sales tax imposed on cigarette sales by Indians on fee lands but not Indian on trust lands); *Seymour v. Superintendent*, 368 U.S. at 358 (rejecting similar jurisdictional division of state and federal criminal authority).

Furthermore, different land uses are often incompatible; the very purpose of zoning is to segregate uses that are hostile to one another. *See, e.g.*, D. Mandelker, *Land Use Law*, section 1.03; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926): "[a] nuisance may merely be the right thing in the wrong place—like a pig in a parlor instead of the barnyard." If an Indian tribe can only designate the permissible uses of non-fee lots, then it cannot ensure that uses on adjacent, nearby, or entirely encircled fee lots are compatible with the tribal zoning uses. The tribe cannot segregate incompatible conduct and activity on land; it cannot effectively zone.

For example, if the tribe designates a given trust area for agricultural use, but the county designates fee lots in that area for residential use, then the tribal scheme becomes unworkable. The use of pesticides, domestic pet interference with livestock and agricultural operations, odors emanating from a farm, and other such things make these two designations incompatible.

Similarly, if the tribe zones an area for low density residential use, but the county zones fee lots sprinkled through the area for high intensity office or industrial complexes, then the purpose and effect of the tribe's design is destroyed. *See Euclid v. Ambler Realty Co.*, 272 U.S. at 391 (noting health and safety dangers of locating office buildings in a residential district). Or, if the tribe desires a given area to remain as undisturbed as possible due to the cultural or religious significance of the area or for other reasons, then even one multi-story apartment complex on one fee

parcel, with its associated traffic, population and congestion, could destroy that scheme entirely. *See Knight v. Shoshone & Arapahoe Indian Tribes, etc.*, 670 F.2d 900 (10th Cir. 1982) (non-Indian owners of fee land proposed large residential subdivision near area where traditional tribal ceremonies held, where tribal cemeteries located, and where substantial other tribal activities took place; court enjoined work on subdivision, finding tribe, not county, had zoning authority); Jurisdiction to Zone Indian Reservations, 53 *Wash. L. Rev.* at 678 n.5.[7]

These conflicts have been live ones on the Colorado River Indian Reservation. Both Parker and CRIT assert zoning and land use regulatory authority over fee lands and Tribal trust lands within Parker. The building and zoning laws applied by Parker and CRIT are inconsistent in certain critical respects. For example, whereas the Parker Town Code severely limits construction with adobe masonry and prohibits construction of traditional tribal dwellings, the CRIT Health & Safety Code allows safe adobe construction and construction of traditional dwellings. The Parker Town Code requires payment of substantial fees before tribal members may construct owner-built structures and improvements, while the CRIT Health & Safety Code waives fees for such owner-built construction.

The conflicts between Tribal and Parker land use and zoning regulations have created problems for CRIT and its members. Serious problems have arisen in connection with at least two federally-funded housing projects initiated by the Colorado River Indian Housing Authority within Parker due to this conflict.

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[7] Of course, adjacent governments often have conflicting land use regulatory schemes. However, there are two critical differences between intra-reservation tribal/county conflicts and adjacent jurisdiction "border" conflicts. The first is that fee lots are typically sprinkled in checkerboard fashion throughout a reservation, whereas adjacent counties and cities merely share common borders. The second is that Indians and whites often hold fundamentally different views about land. The roots of these different views lie deep in the two cultures. As one author explained, the Indian view stresses human's dependence on the natural world, whereas the Christian view stresses mankind's role of exercising dominion over nature. V. Deloria, Jr., *God is Red* (1973) at 91-109, 249.

Many sites that the Housing Authority has found to be the most suitable for the planned housing, and which are available for residential use under relevant CRIT regulations, are not zoned residentially by Parker and thus have not been able to be used for Tribal housing. Application of Parker's zoning has thus resulted in use of inferior lots, delays and added costs, together with increased risks of losing the federal funding for the projects. Another result of regulation by both Parker and CRIT has been that Tribal members, most of whom have extremely limited income and assets, have been required to pay double fees and be subject to dual inspections and administrative review.

These examples demonstrate that a jurisdictional scheme permitting city or county land use regulation of fee lots on reservations would deprive Indian tribes of one of the most important aspects of the power of self-government: the power to protect the public health, safety and welfare. *See Report on Federal, State, and Tribal Jurisdiction, Final Report to the American Indian Policy Review Commission* (1976) (hereinafter "*AIPRC Jurisdiction Report*") at 119 ("Application of State or local land-use controls, directly or indirectly, have [sic] serious adverse effects on the ability of reservation Indians to formulate and implement comprehensive and beneficial development and protection of Indian resources"). Specifically, Indian tribes would effectively be denied the power to zone within their reservations. Although zoning authority would only be expressly denied for fee lands, the net result is that tribal authority to zone non-fee lands would be rendered ineffectual and unworkable due to the lack of authority over checkerboarded fee lands. Such a scheme would, therefore, severely "threaten" and have a "direct effect" on "the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.[8]

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[8] The Court's holding in *Montana* that hunting and fishing on fee land would not imperil the tribe is inapplicable to this case. Allowing a county to regulate hunting and fishing on fee lands does not undermine or negate the power of the tribe to effectively regulate such activities elsewhere on the reservation. In contrast, zoning *by its very nature* demands uniformity and consistency for it to work at all. County/tribal regulation of hunting and fishing is feasible; county/tribal zoning is not.

Rather than eviscerate tribal authority, the Ninth Circuit adopted the course amicus CRIT urges here—recognizing the right of Indian tribes to zone all lands within the reservation.

C. The Zoning Scheme Urged By Petitioners Would Engender Other Unfair and Illogical Results

As noted by the parties and *amici*, a substantial portion of fee lands are owned by Indians or Indian tribes. Petitioners' argument that the General Allotment Act eliminated tribal jurisdiction over fee lands logically implies that counties now have jurisdiction over all fee lots—whether held by Indians or non-Indians. *See* Brief of County of Yakima at 33 (calling for "bright line" division between fee lands (state jurisdiction) and trust lands (tribal jurisdiction)).[9]

Petitioner's bright line rule would also divest tribal authority over fee lands when the county has little interest in regulating the fee lots and the tribe has great interest. For example, this jurisdictional division would strip the Yakima Indian Nation of jurisdiction over the 25,000 acres of fee lots located in the "closed area" of the reservation.

Although petitioners deride the balancing test described by the Ninth Circuit in this case, the rule they propose as an alternative is illogical and contrary to both tribal and non-Indian interests. In CRIT's view, the Ninth Circuit's test is workable; it is certainly no more difficult to apply than other balancing tests applied by the courts under First Amendment, Commerce Clause, or Equal Protection jurisprudence.[10]

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[9] This argument for exclusive county jurisdiction is flatly inconsistent with petitioners' other argument—that tribes should be stripped of zoning authority over fee lands because non-members have no political influence over tribal decisions. The "no representation/no regulation" argument would seem to concede that tribes should at least exercise jurisdiction over fee lots owned by tribal members.

[10] Given the complexities of the jurisdictional conflicts on Indian reservations, neither Indian tribes nor cities, counties or states can expect the Court's decision in this or other cases to bring a final resolution to all of these jurisdiction-related problems. Ultimately,

The Ninth Circuit has correctly held that as a general rule, tribes have the authority to zone fee lands under the second exception of *Montana*. That presumption may, however, be overcome under certain limited circumstances where tribal interests are obviously *de minimis*, such as where a tribe has explicitly renounced any regulatory interest in the fee lands. Such a rule is consistent with *Montana*, with other decisions by this Court, and with congressional enactments on the subject.

V

IF REMEDIES FOR ALLEGED VIOLATIONS OF CIVIL RIGHTS OF NON-INDIANS ON FEE LANDS IN INDIAN RESERVATIONS ARE INADEQUATE, THE PROPER SOLUTION IS CONGRESSIONAL ACTION, NOT JUDICIAL REVAMPING OF THE FUNDAMENTAL PRECEPTS OF INDIAN LAW

A recurrent theme raised by petitioners and their amici, echoing arguments that have been repeated time and again over the years in relation to non-Indians on Indian reservations, is that Indian tribes can have no authority over non-Indians because

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effective solutions which take into account the unique facts of each situation can only be found with the diligent efforts of each of the governmental entities involved and of their constituents. One such solution which CRIT and others have found effective and workable is that of intergovernmental agreements.

CRIT has entered into intergovernmental agreements with the Town of Parker for sewage disposal and fire protection and is negotiating fire protection agreements with Riverside and San Bernardino Counties. CRIT also has an intergovernmental agreement with La Paz County for solid waste disposal as well as various intergovernmental agreements with the State of Arizona for the administration of education, social welfare and vocational programs. While the legal authority for each type of agreement must be addressed on a case by case basis, tribes and local governments have entered into such agreements in areas ranging from law enforcement to child welfare. *See Federal Indian Law* at 380-81. In those situations where full implementation of an intergovernmental agreement requires a specific grant of jurisdictional authority, the agreement can be submitted to Congress for ratification.

non-Indians have no voice in tribal government. In addition, non-Indians argue, there is limited judicial recourse available to them for alleged civil rights violations because under the doctrine of tribal sovereign immunity they may file legal proceedings against a tribe only where the tribe has expressly consented to suit. *See e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The same argument has been made to this Court in virtually every case involving exercise of tribal authority over non-Indians. *See, e.g., National Farmers Union Ins. Co. v. Crow Tribe*, 105 S.Ct. 7 (1985) (Rehnquist, J., granting stay); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 183 (Stevens, J., dissenting opinion); *United States v. Mazurie*, 419 U.S. 544, 557-58 (1975). *See also AIPRC Jurisdiction Report* at 96-98 (1976).

This Court in *United States v. Mazurie*, 419 U.S. at 557-58, quoting *Williams v. Lee*, 358 U.S. at 223, answered the point definitively:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-566, 23 S.Ct. 216, 220-221, 47 L.Ed. 299.

Precisely the same point was made by the American Indian Policy Review Commission which reviewed the issue of exercise of tribal jurisdiction over non-Indians on reservations. The Commission concluded:

> non-Indians which make up the vast majority of nonmembers on reservations, are the beneficiaries of the policies passed by Congress which placed such lands in their hands. Any notion that Indian people received adequate compensation for those lands does not require refutation here. If nonmembers are in a position of loss of property without due process of law, then they must look at the body which occasioned that loss—the United States Congress.

> Remedies available to nonmember fee patent owners should not come at the expense of tribal entities which were subjected to such policies without their consent and, often, over their objections. Such limitations may have the effect of stifling the very forward movements so long promised and so long sought after by Indian people and tribal governments.

AIPRC Jurisdiction Report at 118. Addressing the issues raised in this case, the Commission recommended that tribal regulation of land use within reservation boundaries should preempt any State or local control over both trust and fee patent lands where such tribal regulation is in furtherance of a scheme to develop or protect reservation land or resources. *AIPRC Jurisdiction Report* at 119.

The issue of the conflicts between the expectations of Indian tribes and those of non-Indian settlers is described at length in the recent book *American Indians, Time, and the Law* (1987), by Indian law scholar Charles Wilkinson, at 22-23, 111-119. Like this Court in *United States v. Mazurie*, 419 U.S. at 557-58 and *Williams v. Lee*, 358 U.S. at 223, and like the American Indian Policy Review Commission, Wilkinson concludes that it is up to Congress, not the courts to address the concerns raised by non-Indians on reservations:

> The settled principles of preconstitutional and extraconstitutional tribal status, coupled with the promise of a viable, evolving separatism in the treaties and treaty substitutes, justify race-based tribal governments without political representation by nonmembers. The courts should respect these precepts and provide latitude to tribes by generously construing tribal powers over nonmembers. Congress, not the courts, should make alterations based on expediency.
>
> * * *
>
> A continuing theme of the modern opinions is for the Court to affirm the existence of Indian rights, with the caveat that Congress can make adjustments pursuant to its power over Indian affairs.
>
> * * *
>
> [J]udicial opinions in Indian law usually involve just one tribe but apply generically to all tribes. Thus if a court is influenced by an individual flagrant abuse and departs from principle to deny tribal powers, the rights of all tribes are implicated. . . Whether abuses exist and, if they do, whether they are sufficiently serious to warrant curtailing tribal powers are matters that Congress is best equipped to resolve. A legislature is not bound by the facts of just one case. Congress has investigative and oversight powers designed to produce a comprehensive record. Institutionally, the courts are best suited to the judiciary's traditional role of holding firmly to historic principles that are protective of tribal prerogatives.

American Indians, Time, and the Law, at 117-18.

As Wilkinson also points out, non-Indians on reservations are not totally without recourse as petitioners and their amici imply. *Id.* at 114. Where, for example, tribal officials are acting outside the scope of their official authority, judicial relief may be available. *See, e.g., Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 170-71 (1977). Also, non-Indians may pursue offsetting claims when they are sued by Indian tribes. *See California State Board of Equalization v. Chemehuevi Indian Tribe*, 106 S.Ct. 289 (1985). In addition, this Court's decision in *National Farmers Union Ins. Co. v. Crow Tribe* permits a non-Indian, after exhausting tribal court remedies, to obtain a federal court determination of whether the tribe has jurisdiction.

Finally, various amici claim that Indian tribes are more likely to abuse their zoning power than are cities and counties, as a result of tribes' desires to promote tribal enterprises. The potential for such abuses is, however, no greater with respect to Indian tribes than it is for cities and counties. More and more, cities and counties also are owners of some of the lands which they regulate. Like tribes, cities and counties promote projects on their lands to provide much-needed income. Insofar as there is a risk that a zoning authority will favor its own lands, the risk exists for all governmental entities that both zone and own land within their jurisdiction.

CONCLUSION

The language in *Montana v. United States*, 450 U.S. 544 (1981) concerning tribal powers over non-Indians on fee lands in a reservation can best be understood in light of this Court's prior holdings concerning tribal sovereign powers and limited state jurisdiction on reservations. A review of the applicable case law, as well as all pertinent congressional enactments relating to fee lands on reservations demonstrates that the *Montana* language cannot be given the constricted interpretation urged by petitioners. To the contrary, the instant case presents a perfect example of the type of case that falls squarely within reach of the *Montana* language, as zoning of fee lands on the Yakima Reservation clearly "threatens or has some direct effect on the political integrity, economic secuirty, or the health and welfare of the tribe." 450 U.S. at 566.

As described above, the right to zone *all* lands within an Indian reservation, both fee lands and trust lands, is critical to Indian tribes' right of self-governance. Unlike the hunting and fishing rights at issue in *Montana*, it is impossible and improper to attempt to place zoning authority over fee lands with one governmental entity and zoning authority over non-fee lands with another. Insofar as non-Indians residing or owning fee lands on Indian reservations have legitimate complaints of violations of their rights for which they can find no remedy, it is up to Congress, not this Court, to solve that problem.

For all the reasons stated herein, amicus curiae Colorado River Indian Tribes urges the Court to affirm the decision of the Ninth Circuit in this case.

Dated: November 4, 1988

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Nos. 87-1622, 87-1697 and 87-1711

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL CONGRESS OF AMERICAN INDIANS, ALL INDIAN PUEBLO COUNCIL, and PUEBLO OF SAN ILDEFONSO IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the court of appeals correct in affirming the district court's holding in Whiteside I that the Yakima Nation has exclusive land use regulatory jurisdiction over the "closed area" of the Yakima Indian Reservation?

2. Was the court of appeals correct in reversing and remanding Whiteside II to the district court?

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. THE YAKIMA NATION POSSESSES INHERENT POWERS OF SELF-GOVERNMENT AND REGULATORY JURISDICTION WHICH APPLY THROUGHOUT ITS RESERVATION	11
II. THE LOWER COURTS IN WHITESIDE I CORRECTLY HELD THAT YAKIMA COUNTY IS PRECLUDED FROM EXERCISING LAND USE REGULATORY AUTHORITY IN THE CLOSED AREA OF THE YAKIMA RESERVATION.	15
III. THE EXERCISE OF CONCURRENT COUNTY LAND USE REGULATORY AUTHORITY IN THE "CLOSED AREA" WOULD INFRINGE ON THE YAKIMA NATION'S RIGHT TO SELF-GOVERNMENT.	19

TABLE OF CONTENTS continued

Page

IV. THE COURT OF APPEALS WAS CORRECT IN REVERSING AND REMANDING WHITESIDE II TO DISTRICT COURT. 22

A. The District Court's Analysis Was Incomplete 22

B. The District Court Did Not Have The Benefit Of Subsequent Decisions . . 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, 828 F.2d 529 (9th Cir. 1987) . 8, 9, 10, 13, 15, 17

Fisher v. District Court, 424 U.S. 382 (1976) 11

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) . . . 11, 12, 25, 26

Knight v. Shoshone and Arapahoe Tribes, 670 F.2d 900 (10th Cir. 1982) . . . 24

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). 11, 13, 24

Montana v. United States, 450 U.S. 544 (1981) 11, 13, 14, 15, 23, 24, 26

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 13, 22

Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982) 16

Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987) 20, 24

United States v. Chavez, 290 U.S. 354 (1933) 3

TABLE OF AUTHORITIES continued

Page

Washington v. Confederated Tribes
of the Colville Reservation,
447 U.S. 134 (1980) . . 11, 14, 20, 23

White Mountain Apache Tribe
v. Bracker, 448 U.S. 136 (1980) . . 16

Williams v. Lee,
358 U.S. 217 (1959) 16

Yakima Indian Nation v. Whiteside,
617 F.Supp. 735 (E.D. Wash. 1985)
(Whiteside I). 8, 9, 12, 15 17

Yakima Indian Nation v. Whiteside,
617 F.Supp. 75o (E.D. Wash. 1985)
(Whiteside II) . . . 8, 9, 10, 23, 27

STATUTES:

Act of June 7, 1924,
43 Stat. 636 3

Act of September 18, 1939,
635 Stat. 604 3

Act of September 14, 1961,
75 Stat. 505 3

Treaty With The Yakimas,
12 Stat. 951 24

OTHER AUTHORITIES:

American Land Planning Law
§§1.06, 1.08 (1974) 21

Jurisdiction to Zone Indian
Reservations, 53 Wash. L.Rev.
677 (1978) 21

Wilkinson Petition for Writ
of Certiorari 22

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INTEREST OF AMICI

The Pueblo of San Ildefonso is a federally recognized Indian Tribe located in northern New Mexico. The All Indian Pueblo Council (AIPC)1 is a confederation of nineteen federally recognized Pueblo Indian tribes in New Mexico. While there are notable differences among the Pueblos2, all share a reverence for the lands they occupy, and all respect their duty to pass those lands to their

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[1]The tribes comprising AIPC are Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Picuris, Pojoaque, San Felipe, San Ildefonso, San Juan, Sandia, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia, and Zuni.

[2]Five languages are spoken (Keres, Tiwa, Tewa, and Zuni). The populations of the Pueblos range from 250 members at Pojoaque, to over 10,000 at both Zuni and Laguna. The structures of tribal governments vary from centuries-old traditional governments, which function under unwritten customary law, to Indian Reorganization Act (IRA) governments, which operate under written laws enforced in American-style tribal court systems.

descendants in an unspoiled state. Amicus National Congress of American Indians (NCAI), established forty-five years ago, represents the common interests of American Indian tribes. Over 300 tribes are members of this national organization.

The Pueblo of San Ildefonso, and the member tribes of AIPC and NCAI, have a direct interest in this case based on their present or potential need to regulate land uses by Indians and non-Indians on both trust and fee lands within their reservation borders. Current land use problems at San Ildefonso present a compelling example of a tribe's need for authority to regulate the activities of non-Indians on fee lands within a reservation.

The Pueblo of San Ildefonso's federally recognized land base consists

of 26, 191 acres[3], of which 785 acres are held in fee by non-Indians[4]. The majority of the non-Indian held lands are intermixed with Indian-occupied trust lands in an area of the Pueblo that falls within Santa Fe County, New Mexico.

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[3]The Pueblo's current land base is the product of four federal actions as well as tribal purchases and exchanges of land. In 1864 the United States issued a patent to the Pueblo covering 16,200 acres of lands then controlled and occupied by the Tribe, which had been previously "granted" to the Pueblo by the Spanish Government in the Seventeenth Century. In 1929, Congress set aside an additional 4,431 acres as reservation lands, 45 Stat. 1161. The Act of September 18, 1939, 635 Stat. 604, designated 5,913 acres, known as the "sacred area", as reservation trust lands. The Act of Septmeber 14, 1961, 75 Stat. 505 added 433 acres to the Reservation. Subsequent land purchases and exchanges have resulted in San Ildefonso's current land base of 26,191 acres, all of which are "Indian Country" within the meaning of federal law. See United States v. Chavez, 290 U.S. 354 (1933); 18 U.S.C. §1151.

[4]Under the Act of June 7, 1924, 43 Stat. 636 (Pueblo Lands Act), non-Indians occupying lands within Pueblo boundaries were able to acquire fee titles.

Several of the non-Indian parcels front the Rio Pojoaque, and others overlie groundwater supplies which are critical to the successful maintenance of the Pueblo's traditional agricultural economy and to the future of the Reservation as a permanent home for the Tribe.

Until a few years ago, the eastern portion of the Pueblo, including non-Indian fee lands, was sparsely populated. Land use was largely agricultural and posed no threat to the economic security or health and welfare of Pueblo members. More recently, however, several non-Indian parcels have been subdivided, and mobile home parks have been established on lots fronting the Rio Pojoaque and overlying the Pueblo's groundwater supply. The Pueblo has a direct interest in the outcome of this case because it must have jurisdictional authority to

regulate land use on its reservation to protect its water supply and to preserve the environmental integrity of the reservation land base.

The locations of septic tanks installed by mobile home owners violate Santa Fe County regulations prescribing a minimum distance between septic tanks and the Rio Pojoaque and between septic tanks and groundwater. Leakage from the septic tanks has resulted in dangerous levels of phosphates in many of the wells recently tested. An abandoned gas station on non-Indian land in the same area of the Reservation is suspected to be the source of carcinogenic hydrocarbons detected in groundwater. Despite repeated complaints from Pueblo officials to the County that these activities pose a serious threat to the health and welfare of tribal members, there has been little, if any, enforce-

ment of applicable County laws. While recent negotiations between Pueblo and County officials are designed to resolve health and jurisdictional issues on a contract basis,[5] an amicable and non-litigious resolution is less than a certainty.[6] It is therefore imperative

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[5]The parties have drafted and agreed in principle on an agreement which is expected to be executed in the near future. The agreement would require the county to strictly enforce its health and welfare regulations on non-Indian fee lands within the Pueblo. Thus far the County has not questioned the Pueblo's authority to enact zoning and health and welfare regulations, and enforce such tribal laws on non-Indian fee lands located within the Pueblo. The draft agreement contains a provision expressly allowing the Pueblo to enact and enforce its own regulations in the event that the Pueblo determines that the County's laws, or the administration thereof, are inadequate to eliminate the Pueblo's concerns.

[6]For example, the non-Indian land owners who would be affected by the agreement are not parties. If the Pueblo determines that it must enact and enforce its own regulations, a legal challenge to the Tribe's authority by a non-Indian fee holder is quite unlikely.

that this Court affirm the inherent authority of tribes to regulate the activities of non-Indians on fee lands within their reservation boundaries.

SUMMARY OF ARGUMENT

This case calls upon the Court to resolve two separate challenges to the Yakima Indian Nation's authority to regulate the use of fee lands on its reservation. In Whiteside I, Petitioner Brendale, without support from Yakima County, asks this Court to reverse the court of appeals' affirmance of the district court's holding that the Yakima Nation has exclusive regulatory jurisdiction over his property, located in the "closed area" of the Reservation. Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987). In Whiteside

II (consolidated with Whiteside I in the Ninth Circuit), this Court is asked to resolve the jurisdictional collision between the Tribe and the County over authority to regulate use of Petitioner Wilkinson's land, located in the "open area" of the Reservation.

In Whiteside I, the court of appeals correctly affirmed the district court's ruling that the Yakima Nation retains inherent authority to provide for zoning and land use regulation in the closed area, and that Yakima County is preempted from exercising regulatory authority in that part of the Reservation. Nonetheless, while the district court's preemption analysis in Whiteside I reached the right result, the court erroneously dismissed the possibility that concurrent county jurisdiction might infringe on the Tribe's right of self-government -- an

inevitable resutl when governments compete for the right to zone and regulate land uses on the same piece of property. In the field of zoning, once tribal authority is confirmed, a heavy burden should be placed on a competing subdivision of state government to justify the imposition of concurrent jurisdiction.7

In Whiteside II, the court of appeals, reversing the district court, correctly concluded that the Tribe has inherent authority to regulate land use on its reservation. The court of appeals remanded to the district court to

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[7]The district court's analysis in both Whiteside I and Whiteside II did not include discussion of the fact that only the Tribe is capable of administering comprehensive land use regulation in areas consisting of both trust and fee lands. As the court of appeals observed, the "Yakima Nation has exclusive authority to zone tribal trust land...." 828 F.2d at 534.

determine whether or not county regulation is precluded in the "open area" of the reservation as well as the "closed area". The district court's analysis of whether tribal or county authority should prevail was both incomplete and inadequate in view of subsequent decisions of this Court and the Ninth Circuit Court of Appeals.

ARGUMENT

I. THE YAKIMA NATION POSSESSES INHERENT POWERS OF SELF-GOVERNMENT AND REGULATORY JURISDICTION WHICH APPLY THROUGHOUT ITS RESERVATION.

The decisions of this Court confirm that Indian tribes retain broad, inherent powers of self-government and territorial management. Less than two years ago, all nine Justices of this Court[8] agreed on

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[8] In Iowa Mutual Ins. Co. v. La Plante, 480 U.S. 9 (1987), Justice Stevens filed a separate opinion which did not disagree with the language quoted.

the following holding, and the authority cited to support it:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See Montana v. United States, 450 U.S. 544, 565-566 (1981); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-153 (1980); Fisher v. District Court, 424 U.S., at 387-389... '[T]he Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government...' Merrion v. Jicarilla Apache Tribe, 455 U.S., at 149 n. 14.

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987). In noting this Court's recognition of the federal policy of promoting tribal self-government and tribal territorial management, the Iowa decision referred to the doctrines of preemption and infringement, either one of which can serve to preclude enforce-

ment of state laws on Indian reservations.9

Other decisions of this Court during the current decade also support the district court's conclusion in Whiteside I that the Yakima Nation retains inherent authority to "regulate the use that Brendale makes of his fee land within the Reservation's Closed Area," 617 F.Supp. at 744, and the court of appeals' affir-

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9"We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. [citations omitted] This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory' [citation omitted], to the extent that sovereignty has not been withdrawn by federal statute or treaty. The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. '[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.' [citation omitted] "Id. 480 U.S. at 14.

mance. 828 F.2d at 536. In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), this Court used the following language in delineating the Tribe's retained sovereignty:

> It is beyond doubt that the Mescalero Apache Tribe lawfully exercises substantial control over the lands and resources of its reservation, including its wildlife. As noted supra, ... and as conceded by New Mexico, the sovereignty retained by the Tribe under the Treaty of 1852 includes its right to regulate the use of its resources by members as well as non-members. In Montana, we specifically recognized that tribes in general retain this authority.

426 U.S. at 337.

In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), this Court affirmed the Tribe's inherent power to impose a severance tax on non-Indian enterprises doing business on the Reservation. The Merrion Court specifically held that "the Tribe retains all inherent attributes of

sovereignty that have not been divested by the Federal Government...." 455 U.S. at 149 n.14. Under the standard articulated in Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 153 (1980), the inherent powers of tribes are not divested unless their exercise conflicts with the interests of the National Government.10

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[10]"Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations..." 447 U.S. at 153. But see, Montana v. United States, 450 U.S. 544, (1981) (Indian tribes have been implicitly divested of their authority to regulate relations between a tribe and non-members on non-Indian fee land because of their dependent status, except where non-members enter into consensual relationships with the tribe or its members, or where the activities of non-members threaten the political integrity, economic security, or health and welfare of the tribe).

All of these cases, including Montana v. United States, supra n.10, identify retained inherent sovereignty as the source of tribal authority to regulate the activities of non-Indians on both trust and fee lands within reservation boundaries.

II. THE LOWER COURTS IN WHITESIDE I CORRECTLY HELD THAT YAKIMA COUNTY IS PRECLUDED FROM EXERCISING LAND USE REGULATORY AUTHORITY IN THE "CLOSED AREA" OF THE YAKIMA RESERVATION.

Although the analyses of the court of appeals and the district court in Whiteside I differ significantly, the result reached by both courts is correct. An analysis of the relative tribal and county interests in land use regulation in the "closed area" must lead to the conclusion that county regulation is precluded by strong tribal interests and effective tribal regulation.

The district court used a federal

preemption analysis to reach the conclusion that land use regulation by Yakima County in the "closed area" is precluded. The district court rejected the applicability of the test of whether County regulation constitutes an infringement on tribal sovereigntyll on the grounds that "Since the infringement barrier is derived from the right of tribal self-government, it is primarily applicable where intratribal relations are implicated." Yakima Indian Nation v. Whiteside, 617 F.Supp. 735, 746 n.11 (E.D. Wash. 1985) (Whiteside I). The district court concluded, after considering competing federal, tribal, and county

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[11]The infringement doctrine, still vital today, was first announced by this Court in Williams v. Lee, 358 U.S. 217 (1959), which held that the application of state laws on reservations is precluded if they would infringe "on the right of reservation Indians to make their own laws and be ruled by them." Id. at 220.

interests, that under the circumstances county regulatory jurisdiction is preempted by federal law. The court went on to note that if the infringement analysis were applicable, that court would conclude that the Tribe and the County had concurrent land use regulatory authority.12

The court of appeals, on the other hand, reached the same end result utilizing a tribal self-government infringement analysis. The appeals court

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[12]"Since the infringement barrier is derived from the right of tribal self-government, it is primarily applicable where intratribal relations are implicated. [citation omitted] Yakima County's Regulation of Mr. Brendale's property does not violate the right of tribal self-government. Concurrent jurisdiction over Brendale's property would require them to comply with the regulations of Yakima County and the Yakima Nation. Thus, Yakima County would not be infringing on the Yakima Nation's right to 'make their own laws and be ruled by them.' [citations omitted]" 617 F.Supp. at 746 n.10.

expressly rejected the federal preemption analysis, although it noted that "federal policy ... informs our inquiry concerning the reach of Indian sovereignty." 828 F.2d at 533. After concluding that the Yakima Nation has the authority to zone non-Indian fee land throughout the Yakima Reservation as a matter of retained, inherent, sovereign tribal governmental powers, the court went directly to a balancing of tribal and county interests in land use control and affirmed the district court's holding that county regulation in the "closed area" is precluded. Amici submit that the court of appeals' analysis is the correct one, and should be specifically affirmed by this Court.

Where tribal and state jurisdiction is concurrent, and the tribe has acted to exercise its governmental authority with

respect to the particular matter at issue, a balancing of relative tribal and state interests must be undertaken whether the preemption analysis or the infringement analysis is applicable.

III. THE EXERCISE OF CONCURRENT COUNTY LAND USE REGULATORY AUTHORITY IN THE "CLOSED AREA" WOULD INFRINGE ON THE YAKIMA NATION'S RIGHT TO SELF-GOVERNMENT.

Both the district court and the court of appeals found that the Yakima Nation has the right to promulgate and enforce tribal zoning laws in the closed area of the Reservation. This right is an essential aspect of self-government. It would certainly be infringed upon if Mr. Brendale could circumvent tribal zoning laws through compliance with the County's conflicting ordinance. We cannot see how the district court could find that proceeding with the proposed subdivision,

under the authority of the County's ordinance, posed "a threat to the political integrity... of the Yakima Nation," 617 F.Supp. at 744, yet also conclude that County regulation of the Brendale property would not violate the Tribe's right of self-government. 617 F.Supp at 746 n.10. Unlike the field of taxation,[13] concurrent zoning authority would nullify the important governmental objectives of the Tribe's zoning or-

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[13] See, Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 158 (1980) (state taxation of cigarette sales on the Reservation would not interfere with the Tribe's right to assess its own tax). See also, Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1393 (9th Cir. 1987): In contrast to taxation, enforcement of the cities' rent control ordinances would nullify the Tribe's authority to regulate the use of its lands and concurrent jurisdiction would violate the Tribe's right to make its own laws and be ruled by them.

dinance,14 and negate the positive effects of comprehensive land use regulation,15 which only the Tribe is capable of carrying out.16 In this respect, we readily concede the following argument of Petitioner Wilkinson in his Petition for Writ of Certiorari to this Court.

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[14]As the court below appreciated, by "enacting zoning ordinances, a tribe attempts to protect against the damage caused by uncontrolled development, which can affect all of the residents and land of the reservation. Tribal zoning is particularly important because of the unique relationship of Indians to their lands." 828 F.2d at 534.

[15]Citing N. Williams, American Land Planning Law §§1.06, 1.08 (1974), and Jurisdiction to Zone Indian Reservations, 53 Wash. L.Rev. 677, 679, 685 (1978), the court of appeals recognized the importance of planning for coordinated uses of land in a particular area, which "enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses in a desirable pattern." 828 F.2d at 534.

[16]See supra n.7.

> Zoning, however, is not suitable for concurrent jurisdiction. Zoning regulations will frequently directly conflict, requiring deference to one or the other of the zoning authorities. Cf. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)("concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation").

Petitioner Wilkinson, Petition for Writ of Certiorari at 11. Once tribal authority to zone a particular area is confirmed, a trial court should place a heavy burden on the competing state entity to justify the imposition of concurrent jurisdiction.

IV. THE COURT OF APPEALS WAS CORRECT IN REVERSING AND REMANDING WHITESIDE II TO DISTRICT COURT.

A. The District Court's Analysis Was Incomplete

In analyzing the issue of tribal authority in Whiteside II, the district court expressed understandable uncertain-

ty.[17] Unlike the court of appeals,[18] however, in reviewing applicable law, the district court did not even mention this Court's decision in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), that held that tribal powers are not implicitly divested because of the dependent status of tribes, id. at 153, a holding directly contradicted nine months later in Montana v. United States, 450 U.S. 544, 563-64 (1981).

Neither did the district court attempt to reconcile this Court's post-Montana statement that tribes retain "all inherent attributes of sovereignty that

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[17] "Unfortunately, the parameters of that power are anything but settled..." 617 F.Supp at 757.

[18] "The Supreme Court has, without apparent consistency, applied two tests to determine the limit on tribal authority over the conduct of non-Indians." 828 F.2d at 533

have not been divested by the Federal Government..." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982).19 The authority of the Tribe derived from the Treaty With the Yakimas, 12 Stat. 951, was similarly overlooked. Under these circumstances, the district court's analysis of tribal authority and application of the law was less than complete.

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[19]While noting the Tenth Circuit's application of the Montana test in Knight v. Shoshone & Arapahoe Tribes, 670 F.2d 900 (10th Cir. 1982), the district court did not mention the Tenth Circuit's reliance on the Merrion decision in holding that tribal "power to control use of non-Indian owned lands located within the reservation flows from the inherent sovereign rights of self-government and territorial management," 670 F.2d at 903, or the Knight court's finding that the tribal zoning ordinance involved was substantially related to the general welfare of the Reservation's residents. Id.

B. The District Court Did Not Have The Benefit Of Subsequent Decisions

Following the district court's decision in Whiteside II, the Ninth Circuit and this Court rendered decisions which provide additional guidance on the scope of tribal regulatory authority over reservation lands. In Segundo, supra, the Ninth Circuit held that "[i]t is beyond question that land use regulation is within the Tribe's legitimate soverign authority over its lands." 813 F.2d at 1393. This Court's decision last year in Iowa Mutual Ins. Co. v. LaPlante, supra, is particularly significant in light of the district court's rigid application of the Montana test of tribal authority.[20]

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[20]The Iowa Mutual Court's recognition of tribal authority over the activities of non-Indians on reservation lands, and its adherence to the doctrine that tribes retain all attributes of sovereignty that have not been divested by the Federal Government, 480 U.S. at

The Ninth Circuit's analysis squarely faced the problem of contradictory authority, whereas the district court chose to ignore it. The circuit court's thorough consideration of applicable authority contrasts sharply with the district court's incomplete review. Finally, the district court did not have the benefit of considering applicable decisions issued subsequent to its 1985 ruling in Whiteside II. Accordingly, this Court should affirm the circuit court's remand of Whiteside II to the district court.

CONCLUSION

The ability of American Indian tribes to maintain their political, economic, and cultural integrity, and to protect

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14, manifest the inadequacy of a narrow application of the Montana test of tribal authority over non-Indians engaged in activities on reservation lands.

and provide for the health and welfare of both Indian and non-Indian reservation residents, depends upon whether the tribes can effectively govern within the reservation boundaries. An increasingly important aspect of governance on Indian reservations is land use control. The analysis of the court below was correct and should be affirmed.

Respectfully submitted this 4th day of November, 1988.

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